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Supreme Court, U.S.
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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

LORENE YOUNG

PETITIONER

Vs.

CARGILL

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO

UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Marcia V. Forsett

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Bartow, FL 33830
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Attorney for Petitioner

QUESTIONS PRESENTED

Is Cargill entitled to summary judgment as a matter of law?

Whether Cargill is entitled to Employer Immunity based on Florida's Workers Compensation Act Section 440.11 (2) Fla. Stat. §440.01- 440.60 (2000).

Was Lorene Young considered an employee of Cargill?

Did Cargill know or should have known of the dangers of the use Anhydrous Ammonia.

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

All current parties appear in the caption of the case on the cover page, co-defendant Cromwell was dismissed as a defendant. Cargill is not a publicly traded corporation.

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TABLE OF AUTHORITIES CITED

Booher v. Pepperidge Farm Inc., 465 So. 2d 985, 986 (Fla. 1985).....pgs 20,22

Conklin v. Cohen, 287 So.2d 56, 60 (Fla.1973).....pg 24

Crawford v. Florida Steel Corp., 478 So.2d 855, 10 Fla. L. Weekly 2507 (Fla. App. 1 Dist.,1985).....pg 24

Aretha Davis et al vs. .Anvil knitwear Inc. 20 Fed. Appx. 197;2001 U.S. App. LEXUS 22295 (October 2001).....pg 24

Dresher v. Burt (1996), 75 Ohio St.3d 280, 293.....pg 25

Grzybowski v. Aquaslide "N' Dive Corp. (In re Aquaslide "N" Dive Corp.), 85 B.R. 545, 547 (9th Cir. BAP 987).....pg 24

Hikmet v. Turkoglu, 2009 Ohio 6477 (Ohio App. 12/10/2009), 2009 Ohio 6477 (Ohio App., 2009).....pg 26

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(Bankr.Mont. 12/18/2009) (Bankr.Mont., 2009).....pg 25

Younie v. Gonya (In re Younie), 211 B.R. 367, 373 (9th Cir. BAP 1997) .....pg 24.

STATUTES AND RULES

Florida's Workers' Compensation Act. Fla. Stat. § 440.01-40.60 (2001).

Florida's Workers' Compensation Act. Fla. Stat. § 440.015 (2001).

Michigan's Workers Disability Compensation Act of 1969 Act 317of 1969.

The South Carolina Workers' Compensation Law Title 42 §42-1-540.

Ohio Revised Code Title 41 Labor and Industry Chapter 4113.06 Negligence of Employer.

Texas Workers' Compensation Act § 401.012 Definition of Employer.

OTHER

Copy of Docket of the United States Court of Appeals for the 11th Circuit

" 30 + Treated at Hospitals In SunPure Industrial Accident" By Joe Seelig and Joe Rice, Sunday December 30, 2001 Highlands Today.

Affidavit of Carla L. Rushing

A report from the Minnesota Department of Agriculture Agronom and plant protection division Dated from 01/01/1997 to 11/27/2007.

The final order/ opinion of the United States District from the Middle District of Florida issued by Judge Hernandez-Covington
Mrs. Youngs' Medical synopsis
http://www.acusafe.com/Newsletter/Stories/0102News-MonthlyIncidents.htm

The 1987 version of the Standard Industrial Code which can be accessed on the U.S. department of Labor, Occupational Safety and Health Administration's website at www.osha.gov.

http://legal-dictionary.thefreedictionary.com/Parol+Evidence
www.meriam-webster.com/dictionary

Google – Anhydrous Ammonia.
http://video.google.com/videoplay?docid=2788301342151420145#,
http://video.google.com/videoplay?docid=2788301342151420145#docid=-4423993229000614212

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[x] For cases from **federal courts**:

The final order/ opinion of the United States District from the Middle District of Florida in Appendix G and the Final order/Mandate of the United States court of Appeals for the 11th Circuit in Appendix H to the petition.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was September 9,2009. A timely petition for rehearing was denied by the United States Court of Appeals on the following date: November 5, 2009 and a copy of the order denying rehearing appears at Appendix A.

THE JURISDICTION OF THIS COURT IS INVOKED UNDER 28 U.S.C. §1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Florida's Workers' Compensation Act. Fla. Stat. § 440.01-40.60 (2001).

Michigan's Workers Disability Compensation Act of 1969 Act 317of 1969.

The South Carolina Workers' Compensation Law Title 42 §42-1-540.

Ohio Revised Code Title 41 Labor and Industry Chapter 4113.06 Negligence of Employer.

Texas Workers' Compensation Act § 401.012 Definition of Employer.

STATEMENT OF THE CASE

On December 29, 2001 there was a chemical explosion of anhydrous ammonia gas at the SunPure Ltd. Citrus processing plant in Avon Park FL, the leak qualified as a mass casualty incident, sources stated that the leak occurred in a feeder line.[1] Ambulances from three different counties transported patients to four different hospitals. [2]Highlands County Emergency Operations Center Director Bill Nichols stated the gas release happened around 7am, he carries with him a hazardous materials book listing the hazardous materials for every business in Highlands County. He stated that SunPure was listed as having anhydrous ammonia and chlorine present. He also stated that the release of both of these chemicals simultaneously could lead to the evacuation of people living and working within a one-mile radius of the plant.[3] According to Larry Hadden, (environmental health and safety manager for Cargill) It only takes a small amount of ammonia to make

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[1] " 30 + Treated at Hospitals In SunPure Industrial Accident" By Joe Seelig and Joe Rice, Sunday December 30, 2001 Highlands Today.

[2] *Id.*

[3] " 30 + Treated at Hospitals In SunPure Industrial Accident" By Joe Seelig and Joe Rice, Sunday December 30, 2001 Highlands Today.

sensitive people ill/or irritated.[4] Reports of exactly how much ammonia leaked differs. According to Mr. Hadden the venting happens periodically and the venting worked as it should have . There is a difference of opinion as to where the actual release valve was located. It is Mrs.Youngs' opinion that the valve had to be located close to the ground (and most certainly not 20 feet in the air as indicated by Mr. Hadden)[5] because the bang of the explosion and the engulfment of the gas was virtually simultaneous. Videos of similar accidents on the internet shows clouds that move and expand horizontally.[6] Mrs. Lorene Young (a lead supervisor) was one of 30 plus employees of Citrus force Staffing who had to be transported to hospitals in the immediate area. Since that time Mrs. Young has experienced severe respiratory problems including chemically induced asthma, bronchitis and frequent nose

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[4] *Id.*

[5] " 30 + Treated at Hospitals In SunPure Industrial Accident" By Joe Seelig and Joe Rice, Sunday December 30, 2001 Highlands Today.

[6] Google – Anhydrous Ammonia. http://video.google.com/videoplay?docid=2788301342151420145#, http://video.google.com/videoplay?docid=2788301342151420145#docid=-4423993229000614212

bleeds, she suffers from short term memory loss, panic attacks and anxiety Mrs. Young continues to be under doctors'(she sees a pulmonary specialist 2 or 3 months due to her chronic bronchitis) care from the injuries she sustained from exposure to anhydrous ammonia on a daily basis and the massive exposure she sustained on December 29,2001.

The jobs included, but were not limited to, unloading fruit, receiving fruit, sectioning of fruit, etc. on a continuous basis, the employees, including Mrs. Young were exposed to ammonia. According to the Affidavit of Ms. Carla L. Rushing dated April 3, 2008[7] she was also a lead and was exposed to ammonia on a daily basis according to Ms. Rushing in her written statement and Mrs. Youngs' statements the ammonia was the result of leaks in the equipment at the plant. Employees would complain of shortness of breath and headaches. Mrs. Rushing and Mrs. Young would report these complaints to the Plant Manager, Larry Plair, and on occasions he would go and obtain aspirin. On several occasions, Mr. Plair got angry about the complaints and would begin to curse. He would sometimes allow the workers to take a 15 minute break. However, he would order them back to work after the break , in addition he

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[7] Affidavit of Carla L. Rushing is located in Appendix B

would advise everyone that it was safe to go back into the ammonia exposed work area. The majority of the workers were Hispanic and did not speak English or very little; and sometimes they would ask for leads (supervisors) not to complain to Mr. Plair for fear of retribution, loss of jobs or retaliation. It is unknown if all or (any) of the workers were undocumented workers , Naturalized citizens or Spanish Speaking Americans. Mr. Plair told Mrs. Rushing that if the workers were going to complain that she needed to bring in new ones. Mrs. Rushing complained to Mr. Jeff Dicks who was a Cargill (direct hire) Employee. He replied that Cargill knew of the leaks but that there was nothing that he could do about it. At least once per week, the workers would have to leave their work area due to ammonia exposure. They were advised by Mr. Plair to take their work to another area of the plant that may not have been affected by ammonia at that time. This routine action was taken only after workers began to faint and/ or vomit. No one from Cargill ever gave any warnings of an anticipated or possible ammonia leak, there was no alarm system in place that would sound in case of build up of the pressure of ammonia gas in the pipes. Mrs. Young approached Mr. Plair and other Cargill employee supervisors of the need for safety training, in English and Spanish since most of the employees were Hispanic. On the date of the accident Mrs.

Young was transported to Lake Wales Medical Center and was admitted for 24 hours for observation (Mrs. Young had extra exposure to the ammonia because immediately after the explosion she ran to separate parts of the plant to warn her employees and make sure they all evacuated) only to return on December 31, 2001 to be admitted again. Mrs. Young has been admitted on a systematic basis to Lake Wales Medical Center since the accident a record twenty-three times from December 29, 2001 to November 7, 2004[8] there have been several more visits to the hospital since November of 2004 including a visit to Florida Hospital in Sebring Florida on September 29,2006 however, those records are not available as of January 25, 2010. Mrs. Young filed suit in State Court against Cargill Juice and KC Cromwell (Citrus force Staffing) for injuries she sustained in a chemical explosion in Cargill's Avon Park ,Florida plant on December 28,2005, the case was removed to the United States District Court for the Middle District of Florida on July 25,2006. A Cross claim was entered by Cargill against KC Cromwell for indemnity, the case was designated a track 2 case in federal court on July 26,2006, the cross claim was dismissed on January 04, 2007. Various motions were made

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[8] Mrs. Youngs' Medical synopsis is located in Appendix C.

then case management report was completed on October 05, 2007 after which there were attempts at mediation. Mrs. Young's motion to amend complaint to include negligence and gross negligence was denied on May 28, 2008. Depositions were taken. The case was reassigned to Judge Hernandez-Covington on August 05,2008 from Judge James Whittemore. Motions for summary judgment were heard on December 02,2008, Cargill filed a motion for summary judgment (Middle District of Florida docket number 98 case 06-01350-CV-T-27-MAP) and Mrs. Young filed a motion for partial summary judgment asserting that the plain language of the Service Agreement shows that the intent was for Cromwell(Citrusforce) to be an Independent Contractor (Middle District of Florida docket number 105 06-01350-CV-T-27-MAP) and that order was issued on December-15-2008. Notice of appeal was filed February 02,2009. Appeal to the United States Court Appeals for the 11th circuit was submitted by Mrs. Young through counsel on May 11,2009 asserting that Summary Judgment was inappropriate and denied Mrs. Young an opportunity for a jury trial , on June 11, 2009 Cargill filed a motion to dismiss for failure to prosecute and for enlargement of time, on June 17,2009 Appellee Cargill submitted E-Brief. There was a motion for leave to file Appellee brief out of time on June 23,2009.

On August 07,2009 Appellee's motion to dismiss and for extension of time was denied and Appellee's motion to file its brief out of time was granted. Appellee brief was also filed on August 7,2009. Judgment and Opinion was entered on September 09,2009 denying Mrs. Youngs' Appeal. Mrs. Young through counsel filed a Petition for Rehearing Enbanc on September 23,2009. On November 05,2009 the Petition for Rehearing was denied. Case was closed and Mandate issued on November 13,2009.[9]

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[9] Copy of Docket of the United States Court of Appeals for the 11th Circuit is in Appendix A.

REASONS FOR GRANTING THE PETITION

There is a conflict of decisions between the Middle District of Florida and the 9th Circuit Court of Appeals and the Appellate court of Ohio. There are differences of opinions on what institutes a genuine material issue of fact. What constitutes a material issue of fact in deciding to grant a summary judgment motion is a very important question because it poses a bar to litigants who want their day in court. One of our basic freedoms guaranteed by the United States Constitution is our right for the redress of grievances. Our Workers' Compensation Laws were developed to ease excessive litigation however, it was not the intent of the legislators to have those laws eliminate all legal redress for injuries.

> 440.015 Legislative intent.--It is the intent of the Legislature that the Workers' Compensation Law be interpreted so as to assure the quick and efficient delivery of disability and medical benefits to an injured worker and to facilitate the worker's return to gainful reemployment at a reasonable cost to the employer. It is the specific intent of the Legislature that workers' compensation cases shall be decided on their merits. The workers' compensation system in Florida is based on a mutual renunciation of common-law

rights and defenses by employers and employees alike. In addition, it is the intent of the Legislature that the facts in a workers' compensation case are not to be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Additionally, the Legislature hereby declares that disputes concerning the facts in workers' compensation cases are not to be given a broad liberal construction in favor of the employee on the one hand or of the employer on the other hand, and the laws pertaining to workers' compensation are to be construed in accordance with the basic principles of statutory construction and not liberally in favor of either employee or employer. It is the intent of the Legislature to ensure the prompt delivery of benefits to the injured worker. Therefore, an efficient and self-executing system must be created which is not an economic or administrative burden. The Division of Workers' Compensation shall administer the Workers' Compensation Law in a manner which facilitates the self-execution of the system and the process of

ensuring a prompt and cost-effective delivery of payments. [10]

The intent in Michigans' Workers Compensation act reads as follows:

AN ACT to revise and consolidate the laws relating to worker's disability compensation; to increase the administrative efficiency of the adjudicative processes of the worker's compensation system; to improve the qualifications of the persons having adjudicative functions within the worker's compensation system; to prescribe certain powers and duties; to create the board of worker's compensation magistrates and the worker's compensation appellate commission; to create certain other boards; to provide certain procedures for the resolution of claims, including mediation and arbitration; to prescribe certain benefits for persons suffering a personal injury under the act; to prescribe certain limitations on obtaining benefits under the act; to create, and provide for the transfer of, certain funds; to prescribe certain fees;

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[10] Florida's Workers' Compensation Act.

Fla. Stat. § 440.015.

to prescribe certain remedies and penalties; to repeal certain parts of this act on specific dates; and to repeal certain acts and parts of acts.[11]

In South Carolina their Act explains the rights and remedies associated between Employees and Employers.
Employee's rights and remedies under Title exclude all others against employer.
The rights and remedies granted by this Title to an employee when he and his employer have accepted the provisions of this Title, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin as against his employer, at common law or otherwise, on account of such injury, loss of service or death.
Provided, however, this limitation of actions shall not apply to injuries resulting from acts of a subcontractor of the employer or his employees or bar actions by an employee of one subcontractor against

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[11] Michigan's Workers Disability Compensation Act of 1969 Act 317of 1969.

another subcontractor or his employees when both subcontractors are hired by a common employer.[12]

In Ohio the Act describes what is considered negligence by an employer.

When it appears in an action described in section 4113.03 of the Revised Code that the injury or death was caused in whole or in part by the neglect of the employer in failing to properly furnish, maintain, construct, guard, repair, inspect, or protect any of the ways, works, boats, wharves, plant, machinery, appliances, or tools, in any way connected with or in any way used in the business of the employer, in any manner required by the law of this state or of the United States, or by any defective or unsafe condition in the ways, works, boats, wharves, plant, machinery, appliances, or tools, except simple tools, in any way connected with or in any way used in the business of the employer, the fact that such employee continued in said employment with knowledge of such negligent omission or want of care or such defective or unsafe condition is not a defense unless by the

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[12] The South Carolina Workers' Compensation Law Title 42 §42-1-540.

terms of his employment it was expressly made the duty of such employee to report such neglect or such defective or unsafe condition to the employer and the evidence discloses that such employee failed so to report, and that the employer was not otherwise possessed of knowledge of such negligent, unsafe, or defective condition.

Such employee shall not be held to have assumed the risk of:

(A) The negligent act of any fellow servant or employee of such employer, done in obedience to the immediate or peremptory instructions or orders given by the employer, or any other person who has authority to direct the doing of said act;

(B) The want of necessary and sufficient rules and regulations, or the lack of enforcement of same, for the government of such employees in the construction, operation, and maintenance of such ways, works, boats, wharves, machinery, plant, appliances, or tools, or the employing or retention of any incompetent servant.[13]

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[13] Ohio Revised Code Title 41 Labor and Industry Chapter 4113.06 Negligence of Employer.

In Texas the Definition of an Employee is as follows.

Sec. 401.012. DEFINITION OF EMPLOYEE. (a) In this subtitle, "employee" means each person in the service of another under a contract of hire, whether express or implied, or oral or written.

(b) The term "employee" includes:

(1) an employee employed in the usual course and scope of the employer's business who is directed by the employer temporarily to perform services outside the usual course and scope of the employer's business;

(2) a person, other than an independent contractor or the employee of an independent contractor, who is engaged in construction, remodeling, or repair work for the employer at the premises of the employer; and

(3) a person who is a trainee under the Texans Work program established under Chapter 308.

(c) The term "employee" does not include:

(1) a master of or a seaman on a vessel engaged in interstate or foreign commerce; or

(2) a person whose employment is not in the usual course and scope of the employer's business.

(d) A person who is an employee for the purposes of this subtitle and engaged in work that otherwise may be legally performed is an employee despite:

(1) a license, permit, or certificate violation arising under state law or municipal ordinance; or

(2) a violation of a law regulating wages, hours, or work on Sunday.

(e) This section may not be construed to relieve from fine or imprisonment any individual, firm, or corporation employing or performing work or a service prohibited by a statute of this state or a municipal ordinance.[14]

This case was filed in State Court on December 23,2003 it has been over 6 years since suit was filed and 9 years since the accident that this case has not been prompt or cost-effective, as was the intent of the Florida Statutes Mrs. Young is still unable to work due to her injuries sustained in the accident. To give Cargill a summary judgment based on employer immunity when a

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[14] Texas Workers' Compensation Act § 401.012 Definition of Employer.

reasonable prudent person could easily conclude that the defendant was grossly negligent because the defendants knew or should have known of the likelihood that an explosion of ammonia would occur would be unfair and unjust. Two weeks before the Cargill leak on December 17, 2001 there was an ammonia leak at a citrus processing plant in Lake Wales, Florida which is very close in vicinity to the Avon Park facility owned by Cargill.[15] Shortly after the December 29,2001 explosion about 5 days later there was another industrial accident at the Avon Park facility(the cause of the explosion is unknown) the explosion was so intense it actually blew out windows and siding from the building front and it shifted the beams in the administrative offices. On October 08, 2000 Cargill had 4500 LBS of ammonia released at a facility in Havelock Minnesota.[16] If Cargill had significant control of the instrumentality and equipment at the Avon Park facility then as an employer they should have known that an ammonia explosion might occur and should have provided significant safeguards

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[15] http://www.acusafe.com/Newsletter/Stories/0102News-MonthlyIncidents.htm

[16] This information was on a report from the Minnesota Department of Agriculture Agronom and plant protection division Dated from 01/01/1997 to 11/27/2007, there is also listed 8 other incidents where chemicals were wasted a copy of this report is in Appendix D

to protect its' employees from harm. It is Mrs. Youngs feeling that Cargill management was either too detached from the day to day running of the facility to be an actual employer, or if they did know of the constant ammonia leaks and possibility of an explosion then the company is grossly negligent, Cargill can not have it both ways especially since the Florida Workers Compensation Statute state that the Statute should not favor either the employer or the employee but strike a fair and equitable balance.

The Standard Industrial Code defines "help services" as "establishments primarily engaged in supplying temporary or continuing help on a contract or fee basis."[17] However, there is no mention of Independent Contractor which is expressly mentioned in the contract between Cargill and Citrus force (Cromwell). "The actual employment relationship rather than the subjective intent of the parties should control in any determination of whether a special employee may sue the special employer for work-related

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[17] Judge Virginia M. Hernandez Covington's order dated December 15, 2008, quoting the 1987 version of the Standard Industrial Code which can be accessed on the U.S. department of Labor, Occupational Safety and Health Administration's website at www.osha.gov. in Appendix E

injuries."[18] The actual relationship between Cromwell and Cargill is entitled "SERVICE AGREEMENT" and has an indication that Cromwell/Citrus force was an Independent Contractor[19] and indicated what was to be paid per hour to both Leads/Forklift operators and General workers, there was no mention of how supervisors or managers were to be paid. In the case of Crawford v. Florida Steel Corp., 478 So.2d 855, 10 Fla. L. Weekly 2507 (Fla. App. 1 Dist., 1985) there was a question of whether an employee was a borrowed servant. Crawford was paid by North Florida, not its alleged special employer, Florida Steel. Mrs. Young was paid by Cromwell and not Cargill.

> A general employer is one who contracts directly with an employee, while a special employer is one to whom the general employer has loaned his employee. Stuyvesant Corp. v. Waterhouse, ..., and Berrier v. Associated Indemnity Co., ... In this latter instance, the employee is known as a "special employee," or sometimes a "borrowed servant." The courts have

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[18] *Booher v. Pepperidge Farm Inc.*, 465 So. 2d 985, 986 (Fla. 1985)

[19] Service Agreement attached in Appendix F

generally agreed that the criteria for determining the existence of an employer-employee relationship for purposes of the "borrowed servant" doctrine are:

(1) whether a contract for hire, expressed or implied, exists between the employee and the alleged special employer; (in the instant case the contract for hire is expressed in a contract that specifies Independent contractor)

(2) whether the work being done at the time of the injury was essentially that of the alleged special employer; and (the work was being done for Cargill)

(3) whether the power to control the details of work being done at the time of the accident resided in the alleged special employer. (there is a question as to the extent of control that Cargill had over the premises, because Cargill states that a valve was closed by an unknown person not knowing who was trained to maintain the pressure valve and who was not

demonstrates a significant lack of control.)[20]

In the instant case there is a service agreement between Cargill and Cromwell (CitrusForce) which indicates that CitrusForce is and Independent Contractor the difference between the Booher case and the present one is that the court stated that The actual employment relationship rather than the subjective intent of the parties should control in any determination of whether a special employee may sue the special employer for work-related injuries.[21] Subjective is defined as characteristic of or belonging to reality as perceived rather than as independent of mind:[22] There is not mention of a written contract in the Booher opinion . According to the Merriam-Webster's website the definition of objective is as follows: condition in the realm of sensible experience independent of individual thought and perceptible by all observers :[23] In the instant case there is a Service

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[20] Final Order from the United States District Court for the Middle District of Florida issued by Judge Hernandez-Covington.

[21] *Booher v. Pepperidge Farm Inc.*, 465 So. 2d 985, 986 (Fla. 1985)

[22] www.merriam-webster.com/dictionary/subjective

[23] *Id.*

Agreement which can be perceived (read) by anyone, therefore there would be no need to use a subjective test. The purpose of the agreement was to document the responsibilities of each party. The parol evidence rule is a principle that preserves the integrity of written documents or agreements by prohibiting the parties from attempting to alter the meaning of the written document through the use of prior and contemporaneous oral or written declarations that are not referenced in the document. The parol evidence rule applies to written contracts to safeguard the terms of the contract. The courts assume by the parol evidence rule that contracts contain the terms and provisions that the parties specifically intended and lack those provisions that the parties did not want.[24] The court should look to the four corners of the document when the contract is available.

Cargill insists that it is a special employer and deserves immunity from suit. However ...the employer may become liable if he commits some act of negligence for which he should be held liable to the independent contractor's employee, irrespective of the employer-independent contractor relationship. City of Mount Dora v.

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[24] http://legal-dictionary.thefreedictionary.com

/Parol+Evidence

Voorhees, compare Conklin v. Cohen, 287 So.2d 56, 60 (Fla.1973).[25]

In a case from South Carolina summary judgment was Granted to an employer because Appellants were considered grossly negligent simply because a contract was cancelled for goods which resulted in loss of income to Appellee. In Mrs. Youngs case, her working environment and industrial accident caused her to loose work/revenue since December of 2001. Therefore Cargill should be held as being grossly negligent. If loss of money or revenue was determined to be gross negligence then what about loss of health due to an industrial accident.[26]

Therefore Cargill should not have received a summary judgment.

The proponent of a summary judgment motion bears a heavy burden to show that there are no disputed facts warranting disposition of the case on the law without trial." Younie v. Gonya (In re Younie), 211 B.R. 367, 373 (9th Cir. BAP 1997) (quoting Grzybowski v. Aquaslide "N' Dive Corp. (In re Aquaslide "N" Dive Corp.), 85 B.R. 545,

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[25] *Crawford v. Florida Steel Corp.*, 478 So.2d 855, 10 Fla. L. Weekly 2507 (Fla. App. 1 Dist., 1985)

[26] *Aretha Davis et al vs. Anvil knitwear Inc.* 20 Fed. Appx. 197;2001 U.S. App. LEXUS 22295 (October 2001)

547 (9th Cir. BAP 1987)). The manner in which this burden is proven depends on which party has the burden on a particular claim or defense at the time of trial.[27]

> There are different views of what is a genuine material issue of fact in different District Courts , When seeking summary judgment on the ground that the nonmoving party cannot prove its case, the moving party bares the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on an essential element of the nonmoving party's claims. Dresher v. Burt (1996), 75 Ohio St.3d 280, 293. A moving party does not discharge this initial burden under Civ.R. 56 by simply making a conclusory allegation that the nonmoving party has no evidence to prove its case. Id. Rather, the moving party must affirmatively demonstrate by affidavit or other evidence allowed

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[27] *In re Jarvar, Case No. 04-62762-7* (Bankr.Mont. 12/18/2009) (Bankr.Mont., 2009)

> by Civ.R. 56(C) that the nonmoving party has no evidence to support its claims. Id. If the moving party meets this initial burden, then the nonmoving party has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmoving party does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party. Id.[28]

Therefore because there is conflict between districts about the determination of what a genuine issue of material fact is, and there is a conflict between districts about the definition of what constitutes an Employee versus an Independent Contractor and There is a conflict between districts about what constitutes Gross Negligence and there is environmental concerns about how green our planet should and those concerns are of great public interest the Supreme Court of the United States should grant this Writ of Certiorari.

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[28] *Hikmet v. Turkoglu*, 2009 Ohio 6477 (Ohio App. 12/10/2009), 2009 Ohio 6477 (Ohio App., 2009)

CONCLUSION

For all of the foregoing reasons, petitioner respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

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January 28, 2010

APPENDIX A

United States Court of Appeals
for the Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, GA 30303-2289
(404) 335-6100

09-10315-FF
Lorene Young v. Cargill Juice North America

Closed

Docket #: 09-10315-FF
Short Style: Lorene Young v. Cargill Juice North America
Docket Date: 01/20/2009
Lead Case:
Agency:
Nature of Suit: Torts: Personal Injury: Product Liability
Misc. Type:
Clerk: York, Mamendella
Clerk Phone: (404) 335-6175

District Information

Docket #: 06-01350-CV-T-27-MAP **Judge:** Virginia M. Hernandez Covington
Dkt Date: 07/21/2006 **District:** Florida-Middle
NOA Date: 01/14/2009 **Office:** MFL-Tampa

Secondary Case Information

Docket #: **Judge:**
Dkt Date: / /

Case Relationships

Docket #	Short Style	Relation	Status

Pending Motions

No Pending Motions

United States Court of Appeals
for the Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, GA 30303-2289
(404) 335-6100

09-10315-FF
Lorene Young v. Cargill Juice North America

LORENE YOUNG,

Plaintiff-Appellant,

versus

CARGILL JUICE NORTH AMERICA, INC.,

f.n.a. Cargill Citro-America, Inc.,

Defendant-Appellee

Cross Claimant,

KC CROMWELL, INC.,

f.n.a. Spartan Premier, Inc.,

d.b.a. Citrus Force Staffing,

Defendant

Cross Defendant.

United States Court OF Appeals
FOR the Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, GA 30303-2289
(404) 335-6100

09-10315-FF
Lorene Young v. Cargill Juice North America

Appellant	Appellant Attorney
Lorene Young PO BOX 82 FROSTPROOF, FL 33843-0082 *E-Brief Tendered: Appellant filed on 05/11/2009* *Appellant Brief Filed filed on 05/11/2009* *Record Excerpts filed on 05/11/2009* *Fees: Paid on 02/02/2009*	**Marcia Vestylena Forsett** The Forsett Law Office 1405 GREENTREE AVE BARTOW, FL 33830-6745 (863) 605-5359 marciaforsett@msn.com *No Briefing Information Found.*
Appellee	**Appellee Attorney**
Cargill Juice North America, Inc. Address Not On File	**James M. Drozdowski** Hahn Loeser & Parks, LLP 200 PUBLIC SQ STE 2800 CLEVELAND, OH 44114-2306 (216) 274-2553 Fax: (216) 274-2573 jmdrozdowski@hahnlaw.com *E-Brief Tendered: Appellee filed on 06/17/2009* *Appellee Brief Filed filed on 08/07/2009*
	Dawn R. Hays Hahn Loeser & Parks LLP 65 E STATE ST STE 1400 COLUMBUS, OH 43215-4209 (614) 233-5122 Fax: (614) 221-5909 drhays@hahnlaw.com *No Briefing Information Found.*

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United States Court of Appeals
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09-10315-FF
Lorene Young v. Cargill Juice North America

	File Date	Entry	Party	Pending
	01/23/2009	Probable Jurisdiction Noted:	Lorene Young	No
	01/26/2009	DKT2 (Docketing Notice) issued. To:Ronald Louis Nelson; c:Brian T. McElfatrick; c:Bryan D. Hull; c:Dawn Rae Grauel; c:James M. Drozdowski; c:Jeanne L. Seewald; c:Robert J. Fogarty; c:Sheryl L. Loesch		No

	02/02/2009	Application to Appear Pro Hac Vice	Dawn R. Hays	No
	02/03/2009	Appearance Form Submitted	Dawn R. Hays	No
	02/06/2009	Dawn R. Hays' Application to Appear Pro Hac Vice is GRANTED. (TKK)		No
	02/06/2009	MOT2 (Notice of court action) issued. To:Dawn R. Hays; c:Sheryl L. Loesch		No
	02/09/2009	ATTY1 (Appearance form/bar admission letter) issued. To:James M. Drozdowski		No
	02/20/2009	Motion to Withdraw as Counsel::		No
	02/23/2009	E-CIP Filed	Dawn Rae Grauel	
	02/25/2009	CLK1 (Letter to district court) issued. To:Sheryl L. Loesch		No
	03/02/2009	Certificate of Interested Persons	Lorene Young	No
	03/04/2009	Original Papers - 2 vols. pldgs ; 1 expandable folder		No
	03/05/2009	Motion to withdraw as counsel GRANTED. (SKE)		No
	03/05/2009	REC3 (Letter returning record to district court) issued. To:Sheryl L. Loesch		No
	03/09/2009	Appearance Form Submitted.	James M. Drozdowski	No
	03/09/2009	MOT2 (Notice of court action) issued. c:Brian T. McElfatrick; c:Bryan D. Hull; c:Dawn R. Hays; c:Dawn Rae Grauel; c:James M. Drozdowski; c:Jeanne L. Seewald; c:Robert J. Fogarty; c:Ronald Louis Nelson; c:Sheryl L. Loesch; c:Young, Lorene		No
	03/16/2009	DIS-1 (Dismissal notice, 14 days to correct default) issued. To:Young, Lorene; c:Dawn R. Hays; c:James M. Drozdowski; c:Sheryl L. Loesch		No
	03/27/2009	Court Reporter Financial Arrangements:	Paul Spangler	No
	03/30/2009	Transcript Order Form: 12/2/08 mot hrg (ProSe)	Lorene Young	No
	03/30/2009	Court Reporter Acknowledgement: 12/2/08 mot hrg	Paul Spangler	No
	03/30/2009	Transcript Filed in D.C.: 12/2/08 mot hrg	Paul Spangler	No
	03/30/2009	Notice of Transcript Filing Rec. from Ct. Rptr.: 12/2/08 mot hrg	Paul Spangler	No
	03/30/2009	Court Reporter Financial Arrangements:	Paul Spangler	No
	03/31/2009	Briefing Notice Issued		No
	03/31/2009	BR1CIV (Letter confirming brief due date) issued. To:Young, Lorene; c:Dawn R. Hays; c:James M. Drozdowski		No
	04/09/2009	Certificate of Readiness		No
	04/14/2009	Appearance Form Submitted.	Marcia Vestylena	No

			Forsett	
	04/15/2009	E-CIP Filed	Dawn R. Hays	No
	04/15/2009	E-CIP Filed	James M. Drozdowski	No
	04/16/2009	CORRECTED Certificate of Interested Persons: (Atty: James M. Drozdowski)	Cargill Juice North America, Inc.	No
	05/11/2009	E-Brief Tendered: Appellant by Marcia Vestylena Forsett	Lorene Young	No
	05/11/2009	Appellant Brief Filed: M 5/21 PTD (Missing date on proof of service, Record Excerpts need to be separated from aplt brief) (Atty: Marcia Vestylena Forsett)	Lorene Young	No
	05/11/2009	Record Excerpts: M 5/21 PTD (Durable Cover, Cover page need to be in compliance with 11th Cir. R. 28-1(a), Missing 4 copies, complaint, answer, doc #128, #129) (Atty: Marcia Vestylena Forsett)	Lorene Young	No
	05/12/2009	BR7 (Brief deficiency letter) issued. To:Marcia Vestylena Forsett; c:Dawn R. Hays, c:James M. Drozdowski		No
	05/12/2009	EXC-1CIV (Record Excerpts deficiency letter) issued. To:Marcia Vestylena Forsett, c:Dawn R. Hays; c:James M. Drozdowski		No
	06/11/2009	Motion to Dismiss Appeal for Failure to Prosecute & for Enlargement of Time: (Atty: James M. Drozdowski)	Cargill Juice North America, Inc.	No
	06/15/2009	corrected cos: (Atty: James M. Drozdowski)	Cargill Juice North America, Inc.	No
	06/17/2009	E-Brief Tendered: Appellee by Dawn R. Hays	Cargill Juice North America, Inc.	No
	06/19/2009	MOT2 (Notice of court action - to file OOT motion) issued. To:Dawn R. Hays; c:James M. Drozdowski, c:Marcia Vestylena Forsett		No
	06/23/2009	Motion for Leave to File Ape's Reap Brf Out of Time: (Atty: James M. Drozdowski)	Cargill Juice North America, Inc.	No
	08/07/2009	Ape's MTD this appeal and for an extension of time to file its brf is DENIED. Ape's mot to file its brief out of time is GRANTED. (JLE/SHB/EEC)		No
	08/07/2009	MOT2 (Notice of court action) issued. To:James M. Drozdowski; c:Dawn R. Hays; c:Marcia Vestylena Forsett		No
			Cargill Juice	

BEST AVAILABLE COPY

	08/07/2009	Appellee Brief Filed: (Atty: James M. Drozdowski)	North America, Inc.	No
	08/11/2009	Record on Appeal		No
	08/11/2009	Exhibits		No
	09/09/2009	Judgment Entered		No
	09/09/2009	OPIN1A (Notice of issuance of opinion) issued. costs taxed against the appellant c:James M. Drozdowski; c:Marcia Vestylena Forsett; c:Virginia M. Hernandez Covington		No
	09/09/2009	Opinion Issued		No
	09/23/2009	Certificate of Interested Persons: (Atty: Marcia Vestylena Forsett)	Lorene Young	No
	09/23/2009	Petition for Rehearing En Banc: (Atty: Marcia Vestylena Forsett)	Lorene Young	No
	10/01/2009	MP-1 (Multi-Purpose letter) issued - returned response to petition en banc- . To:Dawn R. Hays; c:James M. Drozdowski; c:Marcia Vestylena Forsett		No
	11/05/2009	The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, the Petition(s) for Rehearing En Banc are DENIED		No
	11/05/2009	REHG1 (Letter enclosing order) issued. To:Marcia Vestylena Forsett; c:Dawn R. Hays; c:James M. Drozdowski		No
	11/13/2009	Record and Exhibits Returned to District Court: 3 v. ROA & 1 fld. EXH		No
	11/13/2009	CASE CLOSED-Mandate Issued		No
	11/13/2009	Mandate Issued		No
	11/13/2009	MDT1 (Letter issuing mandate) issued. To:Sheryl L. Loesch; c:Dawn R. Hays; c:James M. Drozdowski; c:Marcia Vestylena Forsett		No

PACER Service Center			
Transaction Receipt			
01/25/2010 16:20:43			
PACER Login:	th7481	Client Code:	
Description:	docket sheet	Case Number:	09-10313-FF
Billable Pages:	6	Cost:	0.48

Send Comment Change Client Code View Billing History Search

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

LORENE YOUNG,

Plaintiff,

CASE NO. 8:06-CV-1350-T-27MAP

v.

CARGILL JUICE NORTH AMERICA, INC.,

Defendant.
_____/

AFFIDAVIT OF CARLA L. RUSHING

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH

The affiant, CARLA L. RUSHING, being duly sworn upon oath, deposes and states as follows:

1. I am over the age of 18.

2. From November 22, 2001 through May 31, 2002 I was employed by Citrus Force Staffing, Inc. and assigned to work at the Cargill Juice Plant located on Sun Pure Road in Avon Park, Florida.

3. My job title was that of a "Lead" and I was responsible for supervising approximately 40 employees whose jobs included, but were not limited to, unloading fruit, receiving fruit, sectioning of fruit, etc.

4. On a continuous, day to day basis, the employees, including myself and the Plaintiff, were exposed to ammonia.

5. This ammonia was the result of leaks in the equipment at the plant.

7. Several of my workers would complain to me about being short of breath and having headaches

8. I would report these complaints to the Plant Manager, Larry Plair, and sometimes he would go and get aspirin.

9. On several occasions, Mr. Plair would get angry about the complaints and begin cursing. He would sometimes allow the workers to take a 15 minute break. However, he would order them back to work after the break. In addition, he would advise everyone that it was safe to go back into the ammonia exposed work area.

10. The majority of the workers were Hispanic and did not speak English or very little; and sometimes they would ask me not to complain to Mr. Plair for fear of retribution or retaliation.

11. Mr. Plair eventually advised me that I needed to bring in new workers if the current workers were going to complain.

12. I complained about the ammonia problems to my supervisor, Jeff Dicks, a Cargill Employee. He replied that Cargill knew of the leaks but there was nothing he could do about it.

13. At least once per week, the workers would have to leave their work areas due to ammonia exposure. We were advised by Mr. Plair to take our work to another area of the plant that may not be affected by ammonia at that given time. This action was taken only after workers began to faint and/or vomit.

14. No one from Cargill ever gave us warnings of an anticipated or possible ammonia leak.

15. At not time during my employ at the Cargill plant did they ever provide any safety training to me or any other workers.

16. About a month into my employ at the Cargill plant, the Plaintiff advised Mr. Plair and other Cargill superiors of the need for safety training for all workers, especially Hispanic, because most of them understood very little English.

FURTHER AFFIANT SAYETH NAUGHT

SUBSCRIBED AND SWORN TO before me this 3rd day of April, 2008 by Carla L. Rushing who is ✓ personally known or ___ produced R252-117-73-681-0 as identification.

Carla L. Rushing

Notary Public
State of Florida
My Commission Expires:

Notary Public State of Florida
Diane Cardenas
My Commission DD410509
Expires 03/03/2009

APPENDIX C

REVIEW OF RECORDS:

1. Lake Wales Medical Center Emergency Room record.

12/29/01. Chemical irritant inhalation and chemical pneumonitis. She presented with sore throat from ammonia inhalation. Given O2, CATAPRES, and SOLU-MEDROL. She was admitted to the hospital and discharged the next day.

12/31/01. Diagnosed bronchitis and sinusitis and treated with antibiotic.

2. Admission to Lake Wales Medical Center.

01/11/02. She was admitted to John Bateman, M.D., for symptoms of productive cough with blood-tinged sputum. Sukumar Mathan, M.D., consulted and felt that the current problem was not related to the chemical exposure. He recommended antibiotics. Mahesh Allam, M.D., also consulted and recommended COMBIVENT inhaler and FLOVENT. He also recommended follow-up pulmonary function tests as an outpatient and follow-up examinations every 6 months for 2 years to rule out the remote possibility of the development of interstitial pulmonary fibrosis or asthma. Discharged on 01/15/02 on LEVAQUIN, FLAGYL, PREDNISONE, and SEREVENT inhalers.

3. Stephen M. Kreitzer, M.D., pulmonary specialist.

09/18/02. She was on DIOVAN, TYLENOL, and SEREVENT. Weight 226. Diagnosed under-treated chemical asthmatic bronchitis. Recommend SEREVENT regularly followed by FLOVENT.

12/16/02. She went to the E.R. several days ago with discolored sputum. Has infectious bronchitis and sinusitis with underlying asthma. Prescribed DYPLYLINE, DEXAMETHASONE, ALLEGRA D, ASTELIN nasal 2 puffs a day, NASONEX 2 puffs twice a day, and TEQUIN 400 mg. per day.

01/10/03. Had a good response to the treatment. Now weighs 234 pounds. Pulmonary tests repeated. Diagnosed reasonably stable asthma and sinusitis. She is to continue SEREVENT and FLOVENT and ASTELIN.

03/25/03. She was never a smoker and never had any pre-existing asthma before the ammonia exposure. She had some worsening of her occupational asthma and fasciitis of the leg. ADVIL, SKELAXIN, SEREVENT, and FLOVENT.

05/27/03. She is now stable. Continue the same medications and avoid all chemicals at work and in the home.

4. Arturo G. Gonzalez, M.D., psychiatrist.

12/06/02. Complains of shortness of breath, numbness in her feet, joint pain, insomnia, depression, fatigue, and irritability since her accident of 12/29/01. Depressed mood started about 2 months after the accident. Beck Depressive Inventory scored 17. An MMPI-2 was said to be valid. Diagnosed Adjustment Disorder with Depression and Psychological Factors affecting a Physical Condition. LEXAPRO started.

03/25/03. LEXAPRO upset her stomach. Still having chest congestion and breathing difficulties. Try PAXIL CR 12.5 mg. per day.

05/27/03. PAXIL seems to be helping. Says her workplace closed. She has not been paid since 12/02.

07/30/03. Feels under great stress. Not working and has no money. Only income is child support of $550 per month. Can't even afford her blood pressure medication. Gave her samples of 12.5 PAXIL.

10/22/03. Had heart attack on 08/15/03. She was hospitalized for 4 days. The attack occurred while her daughter was being air evacuated to Tampa General after an accident. Current medications include ACCUPREL, HCTZ, SEREVENT, and PAXIL 12.5 mg. Has applied for SSD.

5 Stephen J. Szabo, M.D., psychiatrist.

02/05/03. Symptoms include depression secondary to financial problems and a loss of her prestigious position as a supervisor on her shift. She feels rejected in that she was not supported by her managers and her company when she was injured. She reports insomnia, anorexia, inability to do her housework, but no suicidal symptoms. Hamilton Depression Rating Scale scored 28. Beck Depression Inventory scored 18. Diagnosed Adjustment Disorder with Depression and Anxious Mood as well as Chronic Bronchitis. He says she does not need psychological treatment or medications. He says she has no evidence of a Post-traumatic Stress Syndrome.

6 Stuart M. Brooks, M.D., pulmonary specialist.

02/06/03. He says he is unable to confirm a diagnosis of asthma or of Reactive Airways Dysfunction Syndrome from the information available. He says she does not suffer from allergic-type occupational asthma. Most of his report was describing papers he had published on the subject.

7 Susan Hansted, A.R.N.P.

12/29/03. Pain continues. Saw pulmonologist. Sleeps 3-4 hours a night. Poor memory. Continue PAXIL CR.

02/22/04. Had a cold and was coughing up blood. Has to sleep sitting up in a chair. Court cancelled last week and was reset for 10/04/04. Increase PAXIL to 25 mg. per day.

05/05/04. Constant aching in chest in addition to her usual pain. To see cardiologist tomorrow. Headaches intermittently. Switch to ZOLOFT 100 mg. daily.

06/16/04. Some better. Enjoyed going to church. Will increase ZOLOFT to 150 mg. daily.

07/28/04. She says a black car has been following her constantly. A police officer confirmed that it was a Worker's Comp. rep. following her.

09/14/04. Any stress seems to make everything worse. Frequently using inhaler. Frequent headaches. Increase ZOLOFT to 200 mg. per day.

01/28/05. She missed her last 2 appointments. Decreased ZOLOFT temporarily to 100 mg. per day. Will increase back to 100 mg. bid when feeling better. Court postponed again.

03/04/05. Depressive symptoms about the same.

8. Charles G. Walker, M.D., psychiatrist.

04/01/04. She had got back on PAXIL 25 mg. per day. It hasn't helped much so will go back to ZOLOFT.

FLORIDA HOSPITAL
Heartland Division

HHMC	FH Wauchula	FH Lake Placid
4200 Sun N Lake Blvd Sebring, FL 33872 (863) 314-4466	533 W Carlton Street Wauchula, FL 33873 (863) 773-3101	1210 US Hwy 27 N Lake Placid, FL 33852 (863) 465-3777

For _____ Date 9/29/08

Address _____

℞

VOID

_____ M.D.

DEA No. _____

N.R. 1 2 3 4 5

FLORIDA HOSPITAL
Heartland Division

FHHMC	FH Wauchula	FH Lake Placid
4200 Sun N Lake Blvd Sebring, FL 33872 (863) 314-4466	533 W Carlton Street Wauchula, FL 33873 (863) 773-3101	1210 US Hwy 27 N Lake Placid, FL 33852 (863) 465-3777

For _____ Date 9/29/08

Address _____

℞

VOID

_____ M.D.

DEA No. _____

N.R. 1 2 3 4 5

INSTRUCTIONS - verbal / written

- [X] Diagnosis Acute Sinusitis
- [ ] Medications
- [X] Pain Management Tylenol ☐ Sedation warnings
- [ ] Medical Equipment
- [ ] Demonstration
- [ ] Report redness, drainage, increased pain, swelling of ☐ Wound ☐ IV Site ☐ Site of "Shot"

1) Saline Nasal spray 4 times a day
2) Benadryl 25 to 50 mg every 6 hours for runny nose and sinus symptoms
3) [redacted]
4) Follow up with your doctor as scheduled
5) See Central Florida Heart for Chest Pain Clinic and Blood Pressure monitoring

REFERRAL REFERRED TO: CFHC for BP checks and Follow up PHONE ☐ CARD GIVEN

- MAKE APPOINTMENT IN 1 DAYS
- IF NO IMPROVEMENT IN _____ HOURS/DAYS, OR IF YOUR CONDITION WORSENS, OR IF ANY NEW SYMPTOMS DEVELOP, CALL YOUR PRIVATE PHYSICIAN OR RETURN TO THE EMERGENCY DEPARTMENT FOR A RECHECK.

[redacted] PA-C
Physician Assistant
LIC # 9101137

PATIENT'S SIGNATURE

I UNDERSTAND THAT THE TREATMENT I HAVE RECEIVED WAS RENDERED ON AN EMERGENCY BASIS ONLY AND IT IS NOT MEANT TO TAKE THE PLACE OF CONTINUED CARE FROM A PERSONAL PHYSICIAN. FURTHERMORE, I MAY HAVE BEEN RELEASED BEFORE ALL OF MY MEDICAL PROBLEMS WERE APPARENT, DIAGNOSED AND / OR TREATED. IF MY CONDITION WORSENS, OR IF ANY NEW SYMPTOMS DEVELOP, I HAVE BEEN INSTRUCTED TO CALL MY FAMILY PHYSICIAN OR RETURN TO THIS HOSPITAL OR THE NEAREST EMERGENCY CENTER. I HAVE READ AND UNDERSTAND THE ABOVE, RECEIVED A COPY OF THIS FORM AND APPLICABLE INSTRUCTIONS SHEETS, AND WILL ARRANGE FOR FOLLOW UP CARE.

X [redacted] Date & Time 9/29/08 ☐ PATIENT ☐ RELATIVE ☐ FRIEND ☐ OTHER

WORK/SCHOOL STATEMENT FLORIDA HOSPITAL ☐ FHHMC ☐ FH Lake Placid ☐ FH Wauchula

_____ was seen by Dr. _____ at _____ on _____

- ☐ MAY RETURN TO WORK / SCHOOL WITHOUT RESTRICTIONS.
- ☐ MAY RETURN TO RESTRICTED DUTIES FOR _____ DAYS.
  RESTRICTIONS: _____
- ☐ WILL REQUIRE TIME OFF WORK / SCHOOL ESTIMATED TIME _____ DAYS.
- ☐ MUST BE REEVALUATED BY FAMILY / OCCUPATIONAL PHYSICIAN BEFORE RETURNING TO WORK / SCHOOL.
- ☐ NO ATHLETICS / PHYSICAL EDUCATION: _____ DAYS.
- ☐ _____ WAS HERE WITH RELATIVE / CHILD

_____ M.D.

FLORIDA HOSPITAL
Heartland Division
Sebring, Florida

EMERGENCY DEPARTMENT DISCHARGE INSTRUCTIONS

DISCHINST

[redacted]
00071238 09/29/2008 0605041781
YOUNG, LOREME 08/21/1958 F SOY
DEPAUW DO, MICHAEL Emergency
[redacted]

PATIENT'S COPY

11/17/04 House damaged by hurricanes. Depression very slightly better
ZOLOFT 100 mg. twice per day

Comments:

Follow-Up With:
Central Florida Health Care

950 CR17A W
Avon Park, FL

Tel. No. 452 - 3000

When:
Within one to two days

Comments:

Patient Education Materials

LORENE YOUNG has been given the following patient education materials:

Injury & Illness

NOSEBLEED

Bleeding from the nose most commonly occurs due to injury or drying and cracking of the inner lining of the nose (especially during a "common cold" or "hay fever" attack). High blood pressure and hardening of the arteries also cause nosebleeds.

HOME CARE:

1) If a packing was put in your nose, do not pull on it or try to remove it yourself, unless directed to do so by your doctor. You will be given an appointment to have it removed.
2) Do not blow your nose for 12 hours after the bleeding stops. This will allow a strong blood clot to form. Do not pick your nose. This may restart bleeding.
3) Avoid alcohol and hot liquids for the next two days. Alcohol or hot liquids in your mouth can dilate blood vessels in your nose and cause bleeding to start again.
4) Do not take ibuprofen (Advil, Motrin), naprosyn (Aleve) or aspirin-containing medicines since these thin the blood and may promote nose bleeding. You may take Tylenol (acetaminophen) for pain, unless another pain medicine was prescribed.
5) If the bleeding starts again, sit up and lean forward to prevent swallowing blood. Pinch your nose tightly for exactly five minutes (watch the clock). If bleeding is not controlled, continue to pinch and call your doctor or return to this facility.
6) If high blood pressure was a cause for your nosebleed, have your blood pressure checked again tomorrow.
7) If you have a "cold" or "hay fever" with dry nasal membranes, lubricate the nasal passages by

applying a small amount of Vaseline inside the nose with a Q-tip twice a day (morning and night).
Avoid overheating your home, which can dry the air you breath and worsen your condition.

FOLLOW UP with your doctor as advised for packing removal. Nasal packing should be rechecked or removed within 2-3 days

RETURN PROMPTLY or contact your doctor if any of the following occur:

- Another nosebleed that you cannot control
- Dizziness, weakness or fainting
- Fever over 99.5° F (37.5°C)
- Headache
- Sinus or facial pain
- Shortness of breath or trouble breathing

Patient Visit Summary

LORENE YOUNG has been given the following list of patient education materials and follow-up instructions:

Patient Education Materials:
Injury & Illness
EPISTAXIS, Adult

Follow-Up Instructions:

Follow-Up With:
RUIZ MD, JOSE 3200 PHYSICIANS WAY (863) 382-2999

SEBRING, FL 33870

When:

Comments:

Follow-Up With:
Central Florida Health Care

950 CR17A W
Avon Park, FL

Tel No 452 - 3000

When:
Within one to two days

Comments:

If you had any cultures or x-rays performed during your visit, your final reports will be

reviewed. You will be contacted if any further instructions are needed.

I, LORENE YOUNG, understand that the treatment I received was rendered on an Emergency basis only and that further treatment may be necessary. I have been given a copy of the above instructions and I will arrange for follow-up care as outlined above. If my condition worsens, I will call my doctor or return to the Emergency Department.

Patient Signature	Date	Provider Signature	Date

APPENDIX D

MINNESOTA DEPARTMENT OF AGRICULTURE
AGRONOMY & PLANT PROTECTION DIVISION
90 WEST PLATO BOULEVARD, ST. PAUL MN 55107-2094
TELEPHONE: (651) 296-6121, FAX: (651) 297-2271

Incidents Reported in
CHIPPEWA COUNTY
from 01/01/1977 to 11/27/2007

Date Reported	Case File	Pertinent	Incident Cause	Product Involved	Location of Incident: Civil Division	Description	Township / Range / Section
[illegible]	[illegible]	MUSE	SEAL & AIR PRESSURE ON 1 1/2 DIAL RELEASE IT TURNED OVER & THE CAP	LITERATURE OR APPLICATION EQUIPMENT		TRUCK OR MOBILE CAR	BIG BEND
[illegible]	[illegible]	CARGILL INC	TANK LEAK	APPROXIMATELY [illegible] GAL OF [illegible]	MAYNARD	FACILITY OWN / OPERATED - MAYNARD	
[illegible]	[illegible]	CARGILL INC	PRECIPITATION SOIL SAMPLING	UNKNOWN	MILAN	PAD AT OR BLOCK [illegible]	BIG BEND
[illegible]	[illegible]	CARGILL INC	PRECIPITATION SOIL SAMPLING	UNKNOWN	CLARA	FARMING AREA & DEPT IMPROVEMENTS IN AREA	CRATE
[illegible]	[illegible]	CLARA CITY AGRI CENTER	PROPERTY TRANSFER SITE ASSESSMENT	UNKNOWN		AT THE FACILITY IN CLARA CITY	
[illegible]	[illegible]	FARMERS COOP OIL CO	PRECIPITATION SOIL SAMPLING	UNKNOWN	CLARA CITY	2 FEET LOAD OUT AREAS & TIRE PROPAGATION DRIVE THRU AREA	RHEDERLAND
[illegible]	[illegible]	FARMERS UNION OIL CO	MEM BRANDED BINBAITS - BURIED INTO DITCH	NATURAL MATERIALS	MONTEVIDEO	PART OF THE PROPERTY AT FACILITY MONTEVIDEO WEST AREA (IN PROPERTY)	SPARTA
[illegible]	[illegible]	STELLAND OF MILAN INC	MORE OR WARRENO LIGHT CAME OFF		MILAN	1/4 MILE EAST OF MONTEVIDEO AND NORTHERN IN INTERNATIONAL	BIG ARGENT
[illegible]	[illegible]	BOTHUN, J (CBH)	SITE ASSESSMENT AS PART OF SALE	FARMSTEAD AREA LIST / LAND INTENSIVE CONTAMINATION DETECTED		AT THE FACILITY, MILAN WHOLESALE SITE (SOIL)	
[illegible]	[illegible]	MEATHEAD NURSERY	FLOOD CAUSED ALLEGED INCIDENT		MONTEVIDEO	WILCARTHA AVE	
[illegible]	[illegible]	WEBER	RUPTURED SEAL ON APPLICATION PUMP	TRIFLAN T (MEDIUM)	WATSON	1 MILE ON 12TH ST AND SOUTH ON CO RD 6	TI BRANDT
[illegible]	[illegible]	STRAND	FLUSHING LINES FROM A MINIMUM	30-35 GALLONS MONITOR		ABANDONED FARM SITE ON TH PROPERTY OF MARKET OWNER	
[illegible]	[illegible]	TRAEDEN WATER WELLS	UNIDENTIAL LEAK DETECTED BY WELL	LEAD	CLARA CITY	1 MILE WEST OF INTERSECTION OF HWY 7 & 21	STOKEHAM
[illegible]	[illegible]	FARMERS UNION OIL CO	TRUCK ROLLOVER		MONTEVIDEO	(2) BD 13 ABOUT 1 MILE WEST OF MONTEVIDEO	SPARTA WEST
[illegible]	[illegible]	FARMERS UNION OIL CO	SITE ASSESSMENT PRECONSTRUCTION	DETECTED ELEVATED B		2a W MONTEVIDEO MONTEVIDEO	
[illegible]	[illegible]	LHP MIDWEST	HERBICIDE LEAKED DUE TO LOSS OF PRESSURE IN APPLICATOR	600-650 GALLON TANKFOOT OF PRESSURE & WATER		FARMERS FIELD	WATSON
[illegible]	[illegible]	CARGILL INC	HITCH BROKE, MEM RUPTURED BINBAITS. QUICK CPL PLUG FAILED	APPX 1,000 # ANHYDROUS AMMONIA RELEASED		FIELD	HAWK CREEK
[illegible]	[illegible]	MATTHEW BROTHERS INC	RUPTURED CONT ARMER	7 GALLONS OF SYNERGIST	WATSON	WITHIN CHEMICAL STORAGE BUILDING	
[illegible]	[illegible]	FARMERS COOP OIL CO	RUPTURED FOAM MARKER TANK ON FERTILIZER APPLICATOR	FOAM MARKER		NEAR LEGREE AND OLIVINE RIDGE STORAGE	
[illegible]	[illegible]	TWIN TOWNSHIP TRUCK LEASING PLANT WATSON	ABANDONED SITE				
[illegible]	[illegible]	MEMBER COOP	AN ABANDONED SITE				
[illegible]	[illegible]	CARGILL INC	ABANDONED SITE				
[illegible]	[illegible]	CENTRAL STATES COOP	ABANDONED SITE				

As a result of ongoing database programming, we are currently limited as to the kind of reports we can generate for our customers. This list may not meet all of your needs, but it is all we have available at this time.

Incidents Reported In
CHIPPEWA COUNTY
from 01/01/1977 to 11/27/2007

Date Reported	Case File	Personname	Incident Class	Product Involved	Location of Incident			
					Civil Divisions	Description		
[illegible]	[illegible]	CARGILL INC	EMPLOYEE MEMBER OF PUBLIC HEALTH REMAINED LAW APPLIED MATERIAL INSIDE BUILDING	7 GALLONS ALACHLOR		BETWEEN BIRCHBARK CONTAINMENT CELLS BUILDING		
[illegible]	[illegible]	CLARA CITY FARMERS ELEVATOR	ABANDONED SITE					
[illegible]	[illegible]	LES A MATSON	ABANDONED SITE					
[illegible]	[illegible]	CARGILL INC	HOSE BELL OFF TOTE AND SPRAY WAS ON	5-10 GALLONS ROUNDUP WEATHER MAX		OLIVER PACIFIC - JUST NORTH OF CRAIN HIGHWAY ON FIRST ROAD.		
[illegible]	[illegible]	STRAND OF MILAN INC	no response	fertilizer		317 Main St		
[illegible]	[illegible]	MINETA AE	ABANDONED SITE					
[illegible]	[illegible]	CARGILL INC	SPILL FROM MOBILE AIR SPRAYER TANK OVER	3 GALLONS LUMAX HERBICIDE		SPILL ON LOAD PAD		
[illegible]	[illegible]	[illegible]	KITTENS ON BEAVER BROOK	41 PUNCTIES OF FAITH/VIA WERKSTAN		10 FEET EAST OF THE INTERSECTION OF 9TH AVE AND 10TH STREET - SOUTH SIDE/SIDE		
[illegible]	[illegible]	[illegible]	ROTARY A BAG	MAP 70 - ZEMPLAR		2 MILES NORTH OF WATERFALL ARM ON HIGHWAY 73		
[illegible]	[illegible]	CROPMATE CO INC	MALFUNCTION OF CAM LOCK OF TRUCK	14,000 LBS - 28-0-0	MAYNARD	UNKNOWN		
[illegible]	[illegible]	CARGILL INC	HOSE FROM TANK BURST SPLIT	2,500 GAL SAND & WATER MIXTURE		MARK TAMMEN PROPERTY CLARA, MN	STURGEON	[illegible]

As a result of ongoing database programming, we are currently limited as to the kind of reports we can produce for our customers.
This list may not meet all of your needs, but it is all we have available at this time.

APPENDIX E

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

LORENE YOUNG,

Plaintiff,

v. Case No. 8:06-cv-1350-T-33MAP

CARGILL JUICE NORTH AMERICA, INC., et al.,

Defendants.

_____/

ORDER

This matter comes before the Court upon consideration of Defendant Cargill Juice North America, Inc.'s Motion for Summary Judgment (Doc. # 98), filed on May 29, 2008; Plaintiff Lorene Young's Motion for Partial Summary Judgment (Doc. #105), filed on May 30, 2008; and the responses thereto. For the reasons that follow, Defendant's motion for summary judgment is granted and Plaintiff's motion for partial summary judgment is denied.

I. Background

Plaintiff Lorene Young's claims arise from injuries she

allegedly sustained as a result of an ammonia leak at
Defendant Cargill Juice North America, Inc.'s Avon Park juice
processing plant on December 29, 2001. (Doc. ## 2 at 2; 98 at3).
At the time of the accident, Young was employed by
Defendant KC Cromwell, Inc. and was working on assignment at
Cargill. (Doc.# 2 at 2). Pursuant to a joint venture with
another company, Cargill had assumed operations at the
existing Avon Park plant in the fall of 2000. (Doc. # 98 at4).
Pursuant to the terms of a Services Agreement with
Cargill, Cromwell was providing Cargill with "an adequate
number of [Cromwell] employees to meet Cargill's staffing
needs" in two job classifications: Lead Person/Forklift
Operator and General Laborer.1 (Doc. # 98-5 at 7). Under the
terms of the Services Agreement, Cromwell provides an on-site
Management Team to supervise Cromwell employees while they are
working at Cargill.. The Management Team's

responsibilities include training Cromwell employees on
Cargill's rules and procedures, monitoring compliance with
those procedures, and ensuring that Cromwell employees "have
the proper safety training."

The Services Agreement also provides that Cromwell shall
purchase and maintain Worker's Compensation Insurance Employer's Liability Insurance, and Commercial General
Liability Insurance.
Section 8 of the Agreement states:
Independent Contractor. [Cromwell] shall act at all
times as an independent contractor, and nothing contained herein shall be construed to create the relationship of principal and agent, or employer and employee between [Cromwell] and Cargill. [Cromwell] employees assigned to perform the Services for Cargill are solely the employees of [Cromwell].
Young was hired by Cromwell in October 2001 and
immediately placed at Cargill in the position of "Lead."
(Doc. # 105 at 2). Approximately one month later, Young was

promoted to "Supervisor Lead." According to Young,
Cargill employee Charles Hudson was her direct supervisor at
Cargill and was authorized to give Young assignments regarding
where in the plant Cromwell employees were to work. Hudson was also authorized to tell Young when to take Employer's Liability Insurance, and Commercial General
Liability Insurance. Section 8 of the Agreement states:
Independent Contractor. [Cromwell] shall act at all
times as an independent contractor, and nothing contained herein shall be construed to create the relationship of principal and agent, or employer and employee between [Cromwell] and Cargill. [Cromwell] employees assigned to perform the Services for Cargill are solely the employees of [Cromwell].
Young was hired by Cromwell in October 2001 and
immediately placed at Cargill in the position of "Lead."
(Doc. # 105 at 2). Approximately one month later, Young was
promoted to "Supervisor Lead." According to Young,
Cargill employee Charles Hudson was her direct supervisor at

Cargill and was authorized to give Young assignments regarding where in the plant Cromwell employees were to work. Hudson was also authorized to tell Young when to take Cromwell employees out of a certain area based on safety concerns and when it was safe to let employees return to that area. Cargill uses anhydrous ammonia as part of its evaporation process to create juice concentrate. (Doc. ## 98 at 4; 105 at 3). On December 29, 2001, an ammonia release occurred, resulting in the evacuation of numerous employees and transportation of approximately thirty-four employees to the hospital for evaluation. (Doc. # 98 at 7-8). Young alleges that she received "personal and psychological injuries" as a result of her exposure to the ammonia. (Doc. # 105 at 3). As a result of these alleged injuries, Young collected workers' compensation benefits for wage replacement and medical expenses. (Doc. ## 98 at 8; 98-5 at 32-33).

Cargill contends that a subsequent investigation revealed that the leak occurred as a result of an unknown individual closing a suction valve on the refrigeration system. (Doc. # 98 at 8). The Occupational Safety and Health Administration (OSHA) inspected the facility following the accident and issued citations to Cargill for serious violations of OSHA regulations. (Id.; Doc. # 98-4 at 2). Cargill alleges that none of the citations from OSHA were related to the relief valve relieving ammonia pressure on December 29, 2001, and that OSHA's report did not indicate how a release could have been prevented if Cargill had followed OSHA regulations. (Doc. # 98-4 at 2).

Young's two-count complaint asserts claims of intentional conduct against both Cargill and Cromwell.3 (Doc. # 2). Young alleges that her injuries resulted from Cargill's failure to "properly inspect, maintain, and/or repair its

equipment." (Doc. # 2 at 2). In addition, Young alleges that Cargill knew that its equipment was in need of repair, that other ammonia leaks had occurred because of this faulty or defective equipment, and that another ammonia leak was virtually certain to occur. Young further alleges that Cargill knew its equipment created a dangerous condition, but intentionally chose to disregard the danger and instruct its employees to work in these conditions without warning employees of the danger or implementing appropriate safety measures and training. Cargill asserts, as one of several affirmative defenses ,that Young's claims are barred by the immunity conferred under Section 440.11(2) of Florida's Workers' Compensation Act. Fla. Stat. §§ 440.01-440.60 (2000). Section 440.11 provides that an employee who receives workers' compensation benefits for a workplace injury may not thereafter file suit against

her employer for damages resulting from those injuries unless
the employer committed an intentional tort which caused the
injury. Fla. Stat. § 440.11(1).4

Cargill seeks summary judgment as to all of Young's
claims, asserting that Cargill is immune from suit because,
(1) it was Young's employer for purposes of workers'
compensation law at the time of the ammonia leak, and (2)
Young cannot assert facts demonstrating that Cargill's actions
constitute an intentional tort. (Doc. # 98 at 10-24). Young
argues that statutory immunity is not available to Cargill
because Cargill cannot establish that it exerted the requisite
control over Young to qualify as her employer. (Doc. # 113 at
1). In addition, Young asserts that Cargill intentionally
created a situation where death or injury was a substantial
certainty and, therefore, Cargill is not entitled to summary

judgment on the intentional tort issue. Young seeks summary judgment only as to the issue of whether Young was, at all times material, an employee of Cargill such that Cargill may be entitled to immunity under Section 440.11(2). The arguments offered by Young and Cargill on this issue are essentially the same as those asserted in relation to Cargill's summary judgment motion.

II. Summary Judgment Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A factual dispute alone is not enough to defeat a properly pled motion for summary judgment; only the existence of a genuine issue of material fact will preclude a

grant of summary judgment. Anderson v. Liberty Lobby, Inc.,
477 U.S. 242, 247-48 (1986).
An issue is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving
party. Mize v. Jefferson City Bd. of Educ., 93 F.3d 739, 742
(11th Cir. 1996) (citing Hairston v. Gainesville Sun Publ'g
Co., 9 F.3d 913, 918 (11th Cir. 1993)). A fact is material if
it may affect the outcome of the suit under the governing law.
Allen v. Tyson Foods, Inc., 121 F.3d 642, 646 (11th Cir. 1997).
The moving party bears the initial burden of showing
the court, by reference to materials on file, that there are
no genuine issues of material fact that should be decided at
trial. Hickson Corp. v. N. Crossarm Co., 357 F.3d 1256, 1260
(11th Cir. 2004) (citing Celotex Corp. v. Catrett, 477 U.S.
317, 323 (1986)). "When a moving party has discharged its
burden, the non-moving party must then 'go beyond the

pleadings,' and by its own affidavits, or by 'depositions,
answers to interrogatories, and admissions on file,' designate
specific facts showing that there is a genuine issue for
trial." Jeffery v. Sarasota White Sox, Inc., 64 F.3d 590,
593-94 (11th Cir. 1995) (citing Celotex, 477 U.S. at 324).
If there is a conflict between the parties' allegations
or evidence, the non-moving party's evidence is presumed to be
true and all reasonable inferences must be drawn in the nonmoving
party's favor. Shotz v. City of Plantation, Fla., 344
F.3d 1161, 1164 (11th Cir. 2003). If a reasonable fact finder
evaluating the evidence could draw more than one inference
from the facts, and if that inference introduces a genuine
issue of material fact, the court should not grant summary
judgment. Samples ex rel. Samples v. City of Atlanta, 846
F.2d 1328, 1330 (11th Cir. 1988) (citing Augusta Iron & Steel

Works, Inc. v. Employers Ins. of Wausau, 835 F.2d 855, 856(11th Cir. 1988)). However, if the non-movant's response consists of nothing "more than a repetition of his conclusional allegations," summary judgment is not only proper, but required. Morris v. Ross, 663 F.2d 1032, 1034 (11th Cir. 1981).

III. Analysis

A. Employer Status

Under Florida's Workers' Compensation Act, an employer must pay an employee workers' compensation benefits if the employee suffers an accidental injury arising out of work performed in the course of employment. Fla. Stat. § 440.09.5 Generally, an employer's liability is limited to amounts recoverable under the Workers' Compensation Act. Fla. Stat. § 440.11(1). This workers' compensation immunity extends to employers that utilize "the services of employees of a help supply services company, as set forth in Standard Industry

Code Number 7363" when such employees are acting in furtherance of the employer's business. Fla. Stat. § 440.11(2); Tu-Lane Invs., Inc. v. Orr, 889 So. 2d 961, 963(Fla. 1st DCA 2004).

Standard Industrial Code ("SIC") Number 7363 defines "help supply services" as "[e]stablishments primarily engaged in supplying temporary or continuing help on a contract or fee basis."6 According to SIC Number 7363, the temporary help is on the payroll of the supplying company but under the direct or general supervision of the business utilizing the help.

The term "help supply services company" is defined to include temporary help services and employee leasing companies. Tu-Lane, 889 So. 2d at 963; Caramico v. Artcraft Indus., Inc., 727 So. 2d 348, 349 (Fla. 5th DCA 1999).

On May 8, 2008, Young filed a motion to amend her complaint to add new claims for negligence and gross negligence. (Doc. # 90). United States District Judge James

D. Whittemore denied Young's requested amendments as futile, stating that the facts alleged by Young established that Cargill had "'special employer' immunity from suit under Florida's Worker's Compensation Act, Fla. Stat. § 440.11(2)."7(Doc. # 97 at 1). Pursuant to the law-of-the-case doctrine, this Court's prior holding that Cargill is entitled to worker's compensation immunity as a special employer must continue to govern this case unless "the initial decision was 'clearly erroneous and would work a manifest injustice.'" Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 816-17 (1988) (quoting Arizona v. California, 460 U.S. 605, 618 n. 8 (1983)). Young has pointed to no evidence to establish that the Court's previous determination was either clearly erroneous or manifestly unjust. One of Young's primary arguments on this point is that "[i]t is clear from the plain language of the Services

Agreement" that Cromwell and Cargill did not intend for Cargill to be the employer of Cromwell employees assigned to work at Cargill's plant. (Doc. # 105 at 14). In support of this argument, Young relies on Thornton v. Paktank Florida, Inc., 409 So. 2d 31 (Fla. 2d DCA 1981) as "controlling" case law. In Thornton, the court found the borrowed servant doctrine inapplicable based on a contract provision stating that the temporary help service's workers were not to be considered employees of the contracting company "for any purpose." Id. at 33. However, Thornton has since been overruled by the Florida Supreme Court in Booher v. PepperidgeFarm, Inc., 468 So. 2d 985, 986 (Fla. 1985). The present rule as established in Booher is that, "The actual employment relationship rather than the subjective intent of the parties should control in any determination of whether a special employee may sue the special employer for work-related

injuries." 468 So. 2d at 985.
The record evidence in this case clearly supports a
finding that at the time of the accident Young was working in
furtherance of Cargill's business as an employee of a help
supply services company under contract with Cargill. Thus,
the law of this case stands to the effect that Cargill
qualifies as a "special employer" for purposes of workers'
compensation immunity. Young's Motion for Summary Judgment is
therefore denied.

B. Intentional Tort Exception

By necessity and design, Florida's workers' compensation
system "is based on a mutual renunciation of common-law rights
and defenses by employers and employees alike." Fla. Stat. §
440.015 (2000). Under this system, an employer accepts
vicarious liability for employees' work-related injuries
regardless of fault in exchange for immunity from tort
liability. Mullarkey v. Fla. Feed Mills, Inc., 268 So. 2d

363, 366 (Fla. 1972). The employee gives up his tort remedies, but is assured of medical compensation without the cost, delay, and uncertainty of litigation. Id. The tort immunity afforded employers under the statute is a critical aspect of the workers' compensation system. See John T. Burnett, The Enigma of Workers' Compensation Immunity: A Call to the Legislature for a Statutorily Defined Intentional Tort Exception, 28 Fla. St. U. L. Rev. 491, 491-492 (2001) (discussing the policies behind workers' compensation immunity and development of the intentional tort exception to such immunity).

However, the Florida Supreme Court has recognized an intentional tort exception to an employer's workers' compensation immunity where an employer engages in an "intentional act designed to result in or that is substantially certain to result in injury or death to the employee." Eller v. Shova, 630 So. 2d 537, 539 (Fla. 1983)

(citations omitted). In the present case, Young seeks to hold
Cargill liable for her injuries under this intentional tort
exception. Young does not allege that Cargill acted with
deliberate malice to harm Young or other workers and,
therefore, the Court confines its analysis to the alternative
basis for finding an intentional tort.
Florida applies an objective standard in considering the"substantially certain" prong of the test. Turner v. PCR,
Inc., 754 So. 2d 683, 691 (Fla. 2000). Under an objective
test, "an analysis of the circumstances in a case [is]
required to determine whether a reasonable person would
understand that the employer's conduct was 'substantially
certain' to result in injury or death to the employee."
at 688. The employer's actual intent is not controlling under
this approach. Rather, it must be determined whether the
employer should have known that its conduct was substantially
certain to result in injury or death. Id.

The Florida Legislature amended the Workers' Compensation
Act in 2003 to codify the intentional tort exception to
workers' compensation immunity. See Bakerman v. Bombay Co.,
Inc., 961 So. 2d 259, 262 n. 3 (Fla. 2007). The 2003
amendments heighten the intentional tort standard from
"substantially certain" to "virtually certain." Fla. Stat. § 440.11(1)(b) (2008). However, because the accident at
issue here occurred on December 29, 2001, and the statute does
not apply retroactively, pre-2003 workers' compensation law
governs this case. See Bakerman, 961 So. 2d at 262 n. 3; see
also Locke v. Suntrust Bank, 484 F.3d 1343, 1350 n. 5 (11th
Cir. 2007) (applying the pre-2003 "substantially certain"
standard where the incident complained of occurred in 2002). contends,
is there any evidence that it intentionally concealed any risks related to the potential toxicity of
ammonia exposure in the workplace. (Id. at 17-22).

Young asserts that Cargill was aware that ammonia was frequently leaking into certain work areas and having adverse effects on workers, but that Cargill failed to take any corrective action. (Doc. # 113 at 6-8). Further, Young alleges that Cargill intentionally concealed known risks of ammonia exposure by telling Cromwell workers that there was not enough ammonia in the air to make anyone sick.

Young has testified in her deposition that several employees complained to her about the ammonia smell and on occasion would request medication for headaches. (Doc. # 104-2 at 27-29). Young has further attested that when she reported ammonia odors to Charles Hudson, her direct supervisor at Cargill, he usually removed Cromwell employees from those areas and would not allow workers to return until the area had been deemed safe. (Id. at 27, 29-43). On one occasion, Young reports that she kept her employees out of an area where

ammonia odors were present and Hudson implied there might be negative repercussions to that decision. However, Young admits that Cargill never reprimanded her or Young has also offered the testimony of Carla Rushing, another Cromwell lead supervisor, which reflects similar reports from several employees regarding intermittent symptoms of ammonia exposure. (Doc. # 106-2 at 22-30). Rushing has asserted that her Cargill supervisor told her that nothing could be done about the ammonia odor but that if she or other workers were feeling any physical effects, they should take a break and get some fresh air. Young and Rushing have both indicated that Larry Plair, Cargill's Plant Manager, told them on separate occasions that there was no danger to employees from the levels of ammonia that were present in certain work areas. (Doc. ## 104-2 at 36-41; 106-2at 25, 29-30, 45). Although this evidence suggests that Cargill may have acted negligently in exposing workers to levels of ammonia

that were known to be causing physical symptoms in some individuals, the evidence does not establish that Cargill intentionally withheld "knowledge of a defect or hazard which pose[d] a grave threat of injury" to employees. Connelly v. Arrow Air, Inc., 568 So. 2d 448, 451 (Fla. 3d DCA 1990) (finding that an employer will be considered to have acted in the belief that injury was certain to occur where it withholds such knowledge from the employee).8 Florida Courts rarely find that an employer's conduct rises to the level of an intentional tort, even "in the face of sometimes egregious acts by employers and managers." Woodson v. Ivey, 917 So. 2d 993, 996 (Fla. 5th DCA 2005) (citing Byers v. Ritz, 890 So. 2d 343, 347 (Fla. 3d DCA 2004)). A strong probability of injury is not sufficient to overcome workers' compensation immunity. Timones v. Excel Indus. of Fla., 631 So. 2d 331, 332 (Fla. 1stDCA 1994). Turner v. PCR, Inc. is illustrative of the type of

conduct that supports a finding of an intentional tort. In Turner, the employer, PCR, was developing a replacement coolant for Freon using a highly reactive compound that was subject to explosions. 754 So. 2d at 684-85. Even after PCR was notified that the compound was being taken off the market because of its explosive qualities, PCR continued to use it and did not inform its employees of this danger. Id. at 685. In addition, the employer knew of several previous explosions at the plant, some involving this same compound. Applying the objective test, the Florida Supreme Court found that there was sufficient evidence to present material issues of fact that a reasonable employer in these circumstances would know that its intentional conduct was substantially certain to result in injury or death. Unlike Turner, the evidence in this case does not establish prior knowledge or intentional concealment on the

part of Cargill. First, the record does not show that Cargill
possessed knowledge that employees were being placed at risk
for serious injury or death. Although the record shows that
Cargill employees were aware that some level of ammonia
leakage was occurring, the testimony shows that Cargill had no
knowledge of the source of the leaks or the concentration of
ammonia that was present in the work areas. The testimony of Young and Rushing suggests that several
Cromwell employees suffered intermittent physical symptoms due
to some level of ammonia exposure. However, the Court does
not find that, based on the symptoms reported by these
employees, Cargill should have known that serious injury or
death was substantially certain to occur. To the contrary,
there is no evidence that any employee suffered more than
transient physical effects from their exposure to the
apparently small amounts ammonia present in certain work

areas. Furthermore, Cargill has offered expert testimony to
the effect that "a number of microscopic leaks are to be
expected in a juice processing system," that an ammonia odor
can be detected well before the ammonia level "becomes noxious
to the worker," and that individuals have varying sensitivities to ammonia exposure. (Doc. # 98-8 at 2-3).
Importantly, Young has not shown that Cargill had any
knowledge that a release of the type or magnitude that
occurred on December 29, 2001, was likely to occur. Cargill
representatives have testified that the accident in question
occurred when a relief valve released a build up of ammonia
caused by the improper closure of a suction valve by an
unknown individual, and Young has offered no evidence to rebut
this contention. (Doc. ## 102 at 16; 103 at 12-13). Assuming
that Cargill's assertion is true, Young has not shown that
Cargill had prior knowledge of circumstances that might make

such an accident likely to happen. The record contains no evidence of a prior problem with either the suction valves or the relief valves on the refrigeration system. Young has not even alleged that the relief valves malfunctioned at the time of the release. There also were no previous releases from the relief valves that might have put Cargill on notice of the possibility of such a release.

Further, unlike the circumstances in Turner, Young has not established that Cargill intentionally concealed a known risk of a large release of ammonia at the plant. Although Plair sometimes told Young and Rushing that a little amount of ammonia would not hurt anyone, there is no evidence that Plair intentionally concealed the presence of known toxic levels of ammonia in work areas or his knowledge that serious injury would occur if workers were placed in those areas. In fact, both Young and Rushing have testified that Plair himself would

often work in the areas that Cromwell employees were refusing
to work in due to the ammonia odor. (Doc. ## 104-2 at 29-30,
35-37; 106-2 at 25-26). Also, Young has testified that, on
most occasions, both Hudson and Plair removed workers from
areas with ammonia odors and did not let the workers return
until the areas were deemed safe. (Doc. # 104-2 at 29, 34-35,44).
Young asserts that Cargill's failure to properly train
its employees contributed to the ammonia release that caused
Young's injuries. However, in her deposition, Young stated
that "Cargill's representatives, including [Larry Hadden,
Cargill's Environmental and Safety Manager, and Mike
Loudermilk, Cargill's Safety/Refrigeration Supervisor], were
well trained in the use and handling of ammonia . . . ."
(Doc. # 113 at 20). Young has also testified that she was
aware of the risks associated with ammonia exposure, that she

gave safety talks to employees that included the topic of
ammonia, and that she knew to remove her employees when she
detected a strong odor of ammonia. (Doc. # 104-2 at 43-44,
51). Thus, Young has not shown that Cargill's actions
prevented Young from making an informed decision regarding the
risks of working in a facility that uses anhydrous ammonia as
part of its refrigeration process.
In Pendergrass v. R.D. Michaels, Inc., the court considered plaintiff's allegations that defendant's lack of
safety training contributed to plaintiff's fatal injuries.
936 So. 2d 684. The plaintiff in Pendergrass was killed when
a wall that he was constructing collapsed due to the
defendants' failure to brace the wall. Id. at 686. The
defendants did not have a safety program in place, but
instructed workers to use their common sense and to be
careful. Id. at 687. Pendergrass's estate alleged that the

defendants committed an intentional tort because, among other things, they failed to provide a safety program and failed to instruct Pendergrass in safety precautions and recognition of dangers. The Pendergrass court, in addressing the training issue, found that at most the lack of training was an act of negligence, not an intentional tort, because Pendergrass was not using machinery that required special training and it should seem "fairly obvious" that walls and bricks might fall during construction of walls. Similarly, Young was not working with specialized equipment at Cargill and the evidence shows that she was aware that a release of ammonia requiring evacuation might occur. (Doc. # 104-2 at 59-61).

Thus, as in Pendergrass, Cargill's failure to have an official training program in place regarding ammonia does not establish that its conduct rises to the level of an intentional tort.

Young also asserts that Cargill should have known that

the accident was substantially certain to occur because
Cargill's plant was not up to code and that it failed to
follow known safety protocol. (Doc. # 113 at 3-6). In
support of this contention, Cargill points to OSHA violations
that Cargill received after the December 29, 2001, accident.
The OSHA citations, which were classified as
"serious," related to Cargill's failure to follow certain
safety and training procedures.
(Doc. ## 98 at 8-9; 102 at28-34; 113 at 5-6).
The defendants in Pendergrass were similarly cited for
OSHA violations. Unlike here, however, the Pendergrass
violations were directly related to the accident that caused
Pendergrass's injuries. 936 So. 2d at 686-687. Even so, the
court there held that the OSHA violations did not change the
outcome of the case or create a material issue of fact on the
intentional tort issue. The court reasoned that
"a serious violation would not of itself constitute an

intentional tort, because it only requires a substantial probability, not certainty, of injury or death." Id. In light of the holding in Pendergrass, the Court is not persuaded that the OSHA violations in this case, which were not even directly related to the cause of the December 29, 2001, accident, would lead a reasonable jury to find that the subject accident was substantially certain to occur.

Finally, Young asserts that the "totality of the circumstances" establishes that Cargill's intentional conduct was substantially certain to result in injury or death. (Doc.# 113 at 19-20). Citing to several cases that reject the "'cumulative approach' to ascertaining whether injury was a substantial certainty," Cargill argues that Young cannot "add together small risks of injury in order to reach a combined total where the likelihood of injury to some employee sometime is likely to happen." (Doc. # 98 at 22-24) (citing Allstates

Fireproofing, Inc. v. Garcia, 876 So. 2d 1222, 1226
(Fla. 4thDCA 2004) (internal citations omitted); Feraci v. GrundyMarine Constr. Co.,
315 F. Supp. 2d 1197, 1211 (N.D. Fla.2004)).
The Court agrees. In Feraci v. Grundy Marine Construction, Co., plaintiff sought to establish that
defendant was liable for injuries he sustained while working
at a construction site, based on allegations of twenty-two
"grossly negligent" acts or omissions by defendant which
evidenced a "willful and wanton disregard for [plaintiff's]
safety." 315 F. Supp. 2d at 1202-03. Plaintiff argued that
"the composite of circumstances" showed that injury or death
to plaintiff was substantially certain to occur.
Applying Florida law, the district court rejected this
position, stating that even if the twenty-two grossly
negligent acts or omissions had occurred, Plaintiff could not
"lump them together to demonstrate substantial certainty."
Id. Likewise, Young cannot add together each of Cargill's

negligent actions to assert that, in the aggregate, they
establish that an intentional tort was committed.
Under the circumstances of this case, Young has not
established a genuine issue as to any material fact that might
lead a jury to find that a reasonable employee in Cargill's
position should have known that injury or death to Young was
substantially certain to occur. Thus, the Court finds that Cargill is
not subject to liability under the intentional tort exception to workers' compensation immunity. Cargill's motion
for summary judgment is therefore due to be granted.
Accordingly, it is hereby

ORDERED, ADJUDGED, and DECREED:

(1) Plaintiff Lorene Young's Motion for Partial Summary
Judgment (Doc. # 105) is DENIED.
(2) Defendant Cargill Juice North America, Inc.'s Motion for
Summary Judgment (Doc. # 98) is GRANTED.
(3) The Clerk is directed to enter judgment in favor of
Defendant Cargill Juice North America, Inc., terminate
any pending motions, and close the file.

DONE and ORDERED in Chambers in Tampa, Florida, this 15th day of December 2008.

Virginia Hernandez Covington
United States District Judge

Copies:
All Counsel of Record

APPENDIX F

SERVICES AGREEMENT

THIS AGREEMENT made as of this 12th day of October, 2001, by and between Citrusforce Staffing, a S corporation with an address of 1000 North Ashley Drive, Suite 600, Tampa, FL 33602, ("Company") and Cargill Citro Pure, L.P. a Delaware Limited Partnership with an address of 100 East 6th Street, Frostproof, FL 33843("Cargill").

WITNESSETH:

WHEREAS, Cargill has a continuing need for contract services; and

WHEREAS, Company is a leading provider of such services to businesses in the United States and is willing to provide such services;

NOW, THEREFORE, in consideration of the mutual promises herein contained, the parties hereto agree as follows:

1. Services Provided. Company will provide to Cargill the services described in Exhibit A attached hereto and made a part hereof (the "Services") as Cargill shall require at its facilities located at 100 East 6th Street, Frostproof, FL 33843; 1552 SunPure Rd., Avon Park, FL 33825; and 3798 Selvitz Rd., Fort Pierce, FL 34981 pursuant to the terms and conditions of this Agreement. The parties may, from time to time, amend Exhibit A in a writing signed by a duly authorized representative of each party.

2. Term. This Agreement shall continue for a term of one (1) year after the date first entered above, unless sooner terminated as set forth herein, and will automatically renew for like additional terms unless either party serves written notice of its intent to terminate the Agreement not less than thirty (30) days prior to the termination of any such term. Notwithstanding the foregoing, either party hereto prior to the expiration of any such may terminate this Agreement at any time with or without cause by giving not less then thirty (30) days written notice to the other party hereto. The provisions of this Agreement where the context of this Agreement so indicates shall survive any termination or cancellation of the Agreement.

3. Rates for Services. For the first year of this Agreement, the rates for the performance of the Services pursuant to this Agreement shall not exceed those set forth in Exhibit B attached hereto and made a part hereof. However, that should there be a material change of law or regulation by the federal, state or local government impacting Company's costs, such as a change in social security rates, minimum wage, etc., the parties may mutually agree to an increase.

4. Invoices.

(a) Company shall submit to Cargill a weekly invoice for the Services which shall indicate the number of hours, rate per hour, names of employees and job classifications worked during the previous Monday through Sunday billing period. Company shall attach to the invoice, copies of departmental time sheet(s) on which the invoice is based; the time sheets must have been signed by an authorized Cargill representative to verify the hours worked. Company is responsible for getting all signatures. The invoice shall contain breakdowns for each department. Company shall not bill Cargill for time during which Company employees are taking lunch breaks or for travel time to or from Cargill facilities.

(b) Invoices submitted hereunder shall be due and payable on receipt by Cargill, provided, however, that Cargill will return to Company invoices which do not meet the requirements noted in Paragraph 4(a) for correction and will not pay the invoice until a properly prepared invoice is submitted.

5. Reports. Company shall provide to Cargill weekly reports which contain the number of hours worked by Company employees for Cargill and the aggregate billing to Cargill by Company with respect to each of the job classifications set forth on Exhibit A.

6. Buyer Satisfaction. Services shall be performed in a professional and workmanlike and timely manner to achieve their intended purpose, in accordance with industry standards and the standards and specifications set out by Cargill. Further, Company agrees that it shall perform the Services hereunder to the satisfaction of Cargill and agrees to allow Cargill a reasonable period of time to determine if the Services provided by Company were performed in a satisfactory manner. If Cargill determines within a reasonable period of time that the Services provided by a Company employee are not satisfactory, and Company is so notified, Cargill will not be charged for such Services and Company will provide corrective Services and, if necessary or requested, replacement personnel upon notification from Cargill or within a mutually agreed upon period of time.

7. Laws and Regulations. Company agrees that it will comply with all laws and regulations applicable to Company's employees, including, but not limited to, the Fair Labor Standards Act, Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, the Rehabilitation Act of 1973, the Immigration Reform and Control Act of 1986, the Americans with Disabilities Act of 1990, the Family and Medical Leave Act, the Labor Management Relations Act, the Migrant Seasonal Agricultural Worker Protection Act, and the Florida Civil Rights Act.

8. Independent Contractor. Company shall act at all times as an independent contractor, and nothing contained herein shall be construed to create the relationship of principal and agent, or employer and employee between Company and Cargill. The Company employees assigned to perform the Services for Cargill are solely the employees of Company.

9. Company Obligations.

(a) Company shall recruit, interview, test, select and hire the persons who shall provide the Services hereunder. Company shall be responsible for checking I-9 immigration forms, doing periodic drug testing, and checking local criminal records for felony convictions. Company shall also ascertain that immediate family members of Company employees providing the Services hereunder do not work at a competitor's facility and shall not allow such individuals to perform such Services at Cargill. Cargill may waive this requirement at its sole and absolute discretion on a case-by-case basis at the request of Company.

(b) Company shall train the persons who shall provide the Services hereunder. This training shall include an orientation on specific job responsibilities and general expectations of Company employees assigned to Cargill, training on safety measures, and training on the role of the Company Management Team.

(c) Company shall have sole responsibility to counsel, discipline, review, evaluate, set the pay rates of, and terminate its employees assigned to provide Services to Cargill.

(d) Company assumes full responsibility for all contributions, taxes and assessments with respect to its employees under all applicable federal, state and local laws (including withholding from wages of employees where required). Company further warrants that it will comply with all other applicable federal, state or local laws or regulations applicable to Company as an employer regarding compensation, hours of work or other conditions of employment.

(e) Company agrees to keep all Cargill confidential information supplied to and/or learned by Company pursuant to this Agreement and the performance of the Services in the strictest confidence. Confidential information shall mean any commercially sensitive information in its broadest context, and shall include, but not be limited to, access codes, personal identification numbers and other information related to or obtained upon Cargill's computers or computer network. Company shall take and maintain proper and appropriate steps to protect the confidential information received or learned by Company. Company shall not disclose or use Cargill's confidential information, except as required for the efficient performance of the Services, or as may be required to be disclosed pursuant to judicial or governmental process or procedure. Company's obligations with respect to Cargill's coinfidential information shall survive the expiration or termination of this Agreement. Nothing shall be considered confidential information under this paragraph which is, or through no unauthorized act or omission of Company becomes, part of the public domain or is lawfully in Company's possession prior to disclosure by Cargill or being learned by Company.

(f) Company shall perform the Services in a safe and secure manner; shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection the Services and shall comply with all of Cargill's plant and facility safety rules and requirements. Company shall inform and train all Company employees of the rules set out in Exhibit C attached hereto and made a part hereof.

(g) Company will provide Cargill upon request with any relevant supporting records relating to its obligations under the contract.

10. Supplies and Office Space. Company shall be responsible for supplying personnel badges to Company employees to be worn while on assignment at Cargill. Such badges shall be returned upon completion of each Company employee's shift. Company shall also be responsible for providing the following supplies to Company employees: safety glasses, steel-toed boots, hair nets, gloves, rainsuits, earplugs, hard hats, and jumpsuits. Company shall provide and license its own office space. Company shall secure, pay and be responsible for all equipment, services (phone, etc.) for such space.

11. Indemnification. Company shall indemnify and hold harmless Cargill and its parent company, Cargill, Incorporated, and their subsidiaries, agents, employees, directors, successors, and assigns, from and against any and all claims, losses, actions, damages, expenses, and all other liabilities, including but not limited to attorneys' fees and litigation costs, arising out of or resulting from Company's breach of this Agreement, negligent act or omission, or negligent performance of or failure to perform the Services. Cargill shall give reasonable notice to Company of any such claim, loss, action, damage, expense or other liability. Company's obligations pursuant to this Paragraph shall survive the expiration or termination of this Agreement.

12. Insurance. Company shall purchase and maintain the following insurance: Workers' Compensation, Employer's Liability Insurance, and Commercial General Liability Insurance (including personal injury, broad form property damage, contractual indemnity liability and automobile liability). Such insurance coverage shall be written for not less than $5,000,000 or as required by law, whichever is greater; this coverage may be obtained by a combination of primary and excess policies. Cargill and its parent company, Cargill, Incorporated, shall be listed as additional insureds under Company's commercial general liability policy and employer's liability policy. Certificates of such insurance shall be provided to Cargill. If said insurance policy is to be canceled or changed by insured or insurer so as to affect the coverage required by this Agreement, at least ten (10) days prior written notice of such cancellation or change shall be sent to Cargill at the address to which invoices are to be sent by Company.

13. Notices. All notices which it may be necessary or proper for either Cargill or Company to give or deliver to the other shall be sent and shall be deemed given when sent by registered or certified mail and postage prepaid, and if given by Cargill to Company shall be addressed to:

Citrusforce Staffing
1000 North Ashley Drive
Suite 600
Tampa, FL 33602
Attn: Vincent Licata

and if given by Company to Cargill, shall be addressed to:

Cargill Citro Pure, L.P.
P.O. Box 2000
Frostproof, Florida 33843-2000
Attn: Larry Stueve

Either party may change its address and/or designation of representative by giving written notice of such change to the other party.

14. Assignment. Company shall not assign its rights and obligations hereunder without the prior written consent of Cargill. This Agreement shall be binding upon and shall inure to the benefit of the parties hereto, and their respective successors and assigns.

15. Amendments. This Agreement, and the provisions hereof, may be altered, amended, modified or superseded only in a writing executed by both of the parties hereto.

16. Enforcement, Waiver. No waiver of or failure to exercise any option, right or privilege under the terms of this Agreement by either of the parties hereto on any occasion or occasions shall be construed to be a waiver of the same or of any other option, right or privilege on any other occasion.

17. Entire Agreement. This Agreement, together with the Exhibits referenced herein, shall constitute the entire Agreement between the parties with respect to the subject matter and supersedes all previous Agreements between Cargill and Company relating to the subject matter hereof.

18. Governing Law. The terms, conditions and performance of this Agreement shall be governed by the laws of the State of Florida.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their duly authorized officers as of the day and year first written above.

CITRUSFORCE STAFFING

By: Vincent Licata 11/1/01
Vincent Licata

Title: President

CARGILL CITRO PURE, L.P.
By: Cargill Citro America, Inc., its General Partner

By: Bryce Kelly
Bryce Kelly

Its: Assistant Vice President
Operations General Manager

EXHIBIT A

SERVICES PROVIDED BY COMPANY

I. General Requirements.

Company shall provide an adequate number of Company employees to meet Cargill's staffing needs in the job classifications set forth below, as communicated to Company. Company shall be capable of supplying personnel to provide the Services hereunder for three shifts, seven days per week, if needed. Cargill shall give to Company three (3) days advance notification of anticipated staffing needs.

II. Job Classifications.

This Agreement provides for two job classifications – Lead Person/Forklift Operator, and General Laborer – for whose Services Cargill shall pay Company at the rates indicated in Exhibit B. Should Company receive a request to place a Company employee in a position not listed in this Exhibit A, Company shall contact Cargill's Operations General Manager for approval before filling the job.

The job classifications include the following:

A. Management Team

1. Responsibilities

Company shall provide a management Team at no charge to Cargill, whose overall goal is to ensure that Cargill experiences no loss of productivity due to inadequate or insufficient staffing.

The duties of the Management Team include, but are not limited to, the following:

a. The Management Team will work at Cargill on-site to manage and supervise Company employees during their assigned shifts. The Team will work closely with Cargill, including being available for weekly meetings with Cargill (if requested), to ensure that operations move smoothly.

b. The Management Team must learn the different product lines and responsibilities of each position staffed by Company employees at Cargill as well as particular procedures determined by Cargill so that the Management Team can spot trouble and recognize performance problems or infractions of rules and procedures by Company employees.

c. The Management Team is responsible for placing Company employees in positions for which they are best suited or where they are most needed in

order to keep production at an optimum level, at the direction of Cargill. The Management Team must make certain that Cargill is sufficiently staffed at all times, including nights, days, and weekends. The Team is responsible for assuring that Cargill receives the maximum benefit from Company employees; it meets this requirement by providing overall direction and coordination of Company employees and monitoring and transferring Company employees to ensure that Cargill is receiving the best service and production possible.

d. The Management Team is responsible for training Company employees on Cargill's rules and procedures and monitoring compliance. The Team is responsible for implementing Cargill programs, following-up as necessary (e.g., safety incidents), and communicating with Company employees on performance-related issues. The Management Team is responsible for making sure that all Company employees have the proper safety training. The Team will handle emergency situations, such as minor accidents, and must be knowledgeable about emergency procedures. The Management Team is responsible for reporting any safety incidents involving a Company employee to Cargill. The Team will have on-site first aid kits.

e. The Management Team is responsible for providing materials and supplies needed by Company employees, as set forth in Paragraph 10 of the Agreement.

f. The Management Team is responsible for ensuring round-the-clock coverage of the Cargill plant. At least one individual from the Management Team must be on site, or be available by phone/pager to be on site within one hour, as needed.

g. The Management Team shall have full decision-making authority regarding this Agreement. The Management Team shall have the authority to resolve any invoicing or billing issue directly with Cargill. Should Company choose to provide an on-site computer, the Management Team will have access and be trained on employee information retrieval and data entry.

h. The Management Team shall monitor Company employees and be certain that Company employees meet the rules set forth in Exhibit C. The Team is responsible for collecting time sheets from Company employees, turning them in to Company's payroll department, and distributing payroll to each Company employee. The Management Team shall verify that Company employees comply with all safety and security procedures required by Cargill.

f. The Management Team is responsible for supplying to Cargill all required reports, as set forth in the Agreement.

2. Experience and Other Requirements

a. Good work history and verifiable references.

b. Working knowledge of employment laws.

c. Strong people management skills.

d. Willing/able to work overtime as needed.

e. Willing/able to work in inclement weather and non-climate controlled environment.

f. Ability to provide hands-on training and orientation to Company employees.

g. Familiar with Company's payroll and invoice system and able to resolve invoice disputes directly with Cargill.

B. Lead Person

1. Responsibilities

The Lead Person, a/k/a Crew Leader, is the primary contact for Company employees assigned to provide Services to Cargill. The Lead Person will disseminate information to Company employees on work assignments, shifts, and performance-related issues.

2. Experience and Other Requirements

a. Willing/able to provide hands-on training and/orientation.

b. Familiar with Cargill's plant and work needs

c. Willing/able to work in inclement weather and non-climate controlled environment.

C. Forklift Operator

1. Responsibilities

Operate a forklift.

2. Experience and Other Requirements

a. Willing/able to work in inclement weather and non-climate controlled environment.

b. Licensed to operate a forklift.

D. Laborer

1. Responsibilities

A wide range of responsibilities is envisioned for the laborer, including emptying bottles/containers into packing material hoppers, moving packing materials, grading fruit, and generally supporting the operating lines in the plant. Responsibilities may also include placing individual units of finished product into individual containers and then into shipping case blanks.

2. Experience and Other Requirements

a. Able to lift at least 50 pounds on a regular basis during each shift.

b. High degree of manual dexterity in both hands.

c. Able to work with others quickly and efficiently, including working with crews of 3 to 9 other individuals.

d. Able to recognize specific problems related to product packing quality, product defects, and packing material defects while product is moving past them, or is being unpacked at a station.

e. Able to sit/stand for 8 to 12 hour shifts.

f. Normal visual acuity with or without correction.

g. Able to respond to safety equipment cues, such as horns and lights.

h. Able to follow multi-step oral directions.

i. Able to work in inclement weather and in non-climate controlled environment.

EXHIBIT B

BILL RATES

The bill rate covered by this agreement shall be a flat rate for each site as follows:

Frostproof	
Lead Person / Forklift Operator	$11.55 per hour
General Laborer	$ 9.26 per hour
Avon Park	
Lead Person / Forklift Operator	$11.55 per hour
General Laborer	$ 9.26 per hour
Fort Pierce	
Lead Person / Forklift Operator	$12.35 per hour
General Laborer	$ 9.51 per hour

EXHIBIT C

RULES FOR COMPANY EMPLOYEES

Company shall inform its employees of the following expectations Cargill has of Company employees assigned to perform Services at Cargill's plant.

These rules are not intended to be all inclusive.

WHEN WORKING ON CARGILL PREMISES, COMPANY EMPLOYEES WILL BE EXPECTED TO:

1. Work Schedule. Company employees shall:

   A. Be on time and at assigned work area at scheduled work time.

   B. Perform a full day's service by working until the appointed leaving time.

   C. Notify their Supervisor as soon as possible if they must leave their work due to illness or personal emergency. If their supervisor is not available, then the Cargill contact should be notified.

2. Personal Behavior. Company employees shall:

   A. Conduct themselves with honesty, integrity, fairness, and concern for others.

   B. Use pay telephones for personal calls.

   C. Not disturb or interfere with the work of other employees, whether Company employees or Cargill employees.

   D. Not harass others in any way. Harassment based on age, race, religion, national origin, or sex including unwelcome sexual advances will not be tolerated. (Company employees who believe they have been harassed while performing services at Cargill should be directed to report the incident to Company's Management Team immediately. Cargill will assist Company in its investigation.)

   E. Not engage in any fighting, horseplay, or insubordination, and refrain from using abusive or threatening language. Adult behavior conducive to a highly productive work environment is expected always.

   F. Not solicit for any outside business or organization while working on Cargill premises.

G. Never take, or participate in taking, any Cargill products or property, or the property of another person.

H. Not use the Cargill employee bulletin board.

3. Security. Company employees shall:

A. Not report to work under the influence of, or use or possess on Cargill premises, any controlled substance (including legal medical prescriptions that may impair a person's performance) or alcoholic beverages.

B. Wear an identification tag while on Cargill premises and return the tag upon completion of the shift.

C. Not possess firearms or other weapons on Cargill premises.

4. Safety. Company employees shall:

A. Conduct themselves in a manner that ensures their personal safety and the safety of those working around them. If they are unsure how to perform assigned job tasks or conduct any process safely, they should ask Company's Management Team for training. If they are injured or become ill while at Cargill, they should notify the Management Team immediately. Cargill personnel cannot authorize the return to work after an injury of any Company employee.

B. Always keep objects in their proper places and keep work areas clean and free of debris.

C. Smoke and eat in authorized areas only.

Smoking is permitted:

- In designated area outside Contract Service breakroom

Eating is permitted:

- Contract Service breakroom only
- No food or drinks may be taken to the work area

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 09-10315

NON- ARGUMENT CALENDAR

D.C. DOCKET NO.06-01350-CV-T-27-MAP

LORENE YOUNG,
PLAINTIFF

VERSUS

CARGILL JUICE NORTH AMERICA, INC
DEFENDANT

KC CROMWELL, INC
DEFENDANT

Appeal from the United States District Court

For the Middle District of Florida

September 9, 2009

Before TJOFLAT, BIRCH and HULL, Circuit Judges.

PER CURIAM:

This is a personal injury case. The district court granted defendant summary judgment on the ground that defendant was plaintiff's statutory employer and entitled to immunity from suit pursuant to Florida's Workers' Compensation Act. Plaintiff appeals, contending that the "intentional tort" exception to such immunity applies and that material issues of fact remain to be litigated regarding that exception. We disagree, and therefore affirm. The intentional tort exception does not apply for the reasons stated in the district court's December 15, 2008 order granting Appellee summary judgment.

Affirmed.

APPENDIX II

IN THE UNITED STGATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT
NO. 09-10315
NON-ARGUMENT CALENDAR
DC, DOCKET NO.06-01350-CV-T-27-MAP

LORENE YOUNG
PLAINTIFF

VERSUS

CARGILL JUICE NORTH AMERICA, INC
DEFENDANT
KC CROMWELL, INC
DEFENDANT

Appeal from the United States District Court For
the Middle district of Florida
November 05,2009

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, the Petition(s) for Rehearing En Banc are DENIED.

Dated 11/05/2009

APPENDIX I

HIGHLANDS TODAY

Your Daily Local Newspaper

SUNDAY, DECEMBER 30, 2001 • highlandstoday.com • 50¢

INSIDE

Have fit your knows a mom who might be by some good bid Please see Page 6

Today's Weather

Occasional Showers Wind from the north and blowing at 5 mph Sunrise: 7:46 Sunset: 5:43 High 70 - low 48

Three-Day Forecast

Monday

High 70 • low 50

Tuesday

High 70 • low 50

Wednesday

High 70 • low 50

QUIP

"If you pick up a starving dog and make him prosperous, he will not bite you. That is the principal difference between a dog and a man."

– MARK TWAIN

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30+ Treated At Hospitals In SunPure Industrial Accident

By JOE SMITH, Staff Writer
joe.smith@highlandstoday.com

AVON PARK – An early morning explosion and chemical gas leak yesterday at the Avon Park SunPure Ltd. citrus processing plant 2rd to the treatment of 30 plus employees at area hospitals.

There were conflicting reports as to the number of employees affected by the Gas.

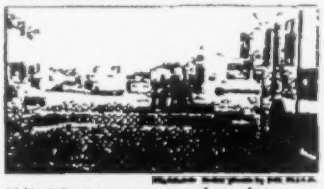
Highlands County Emergency Operations Center Director Bill Nichols said the gas release took place at approximately 2:34 a.m. Workers were followed into the plant by 6:30 a.m.

Nichols said the company's area Haz Mat team told them the situation was under control, but a team of Hazardous Materials Unit members were also present with breathing devices to enable us if

Nichols put the number being treated at area hospitals at 28.

"The - sparkled on a note.

Please see ACCIDENT on page 10A

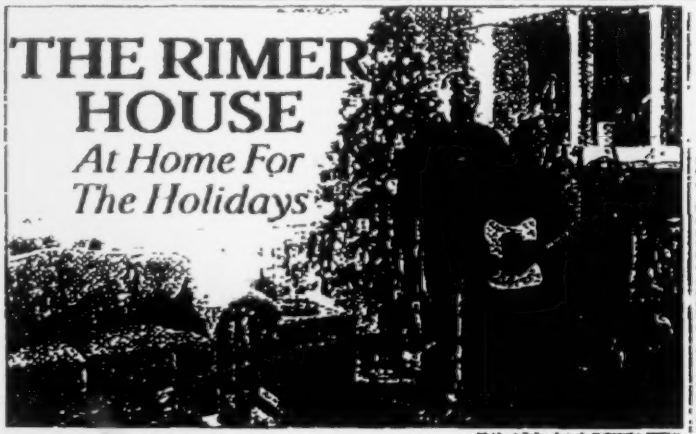


Highlands County emergency personnel responded to an accident at the gas leak at the SunPure citrus processing plant at Avon Park

Highlands Today photos by JOE SMITH

THE RIMER HOUSE

At Home For The Holidays



Highlands Today photos by TERRENCE A. CRIBBS

The Cavalliers love country-style home of Jim and Judy Rimer and daughter Barbara.

By TERRENCE A. CRIBBS
Staff Writer
terrence.cribbs@highlandstoday.com

SEBRING – It's called Dogwood Cottage because deer come to eat in a back pond that borders yet unspoiled Florida woodlands. It's the home of James and Kathleen Rimer and their daughter Barbara.

Located in the Country Club of Sebring, the sprawling home was built by Herbert Wale of Wale & Co.

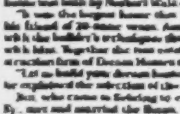
"It was the largest home that Wale had built," Jim says of his friend of 20-some years. And he was impressed enough with the builder's workmanship that he later used him to build one with Mike. Together they have established the local home custom-tailor firm of Dream Homes of Sebring.

"Let us build your dream home," Jim says with a chuckle, as he explained the selection of the name for the new company.

Jim, who came to Sebring to escape the cold of Louisville, Ky., met and married the Rimer, Ohio-born Kathleen Keefe, who had settled in Sebring up for while her mother still resides there.

Shortly after that wedding, the newlywed couple relocated in Aiken, S.C., and established a cemetery business "across the river" in Augusta, Ga.

While living in Aiken, the Rimers were attracted to a style of house, which many here have described as a Carolina low country cottage. Jim, however, refers to it as a Southern Living Romance because he got the latest idea for their home from plans he saw in the popular magazines.



Tiles embedded in the hardwood flooring of the foyer add charm and uniqueness to the entrance of the home.

Whatever the couple wrote and to Sebring in 1996 and are almost finishing a home, they completed was a number of plans from what they had seen on the magazine. The sketchers were given to Wale for refinement and a foundation he washed that deal.

"We've had a lot of ideas of in this house," Jim says of the final design.

Following the low country style of elevating homes because of flooding in the area, the Rimer's home built home is also raised giving it a distinctive and commanding appearance. The builder hoped, however, do leave a lot from hurdens.

Originally the plans called for a covered hallway running from the front door to the rear of the home similar to an open-air dogtrot when there were no air conditioning. The couple decided, however to utilize that treated space by enclosing part of the hall for a utility room, converting another part into what they refer to as the hall foyer and extending the center bedroom into where the hall had no a rear door.

As a result, the bedroom is now to longer than 30 feet long, providing space for a sitting area.

The home has 2,000 square feet of living area under air and a total of 3,500 square feet under roof. "It's three doors porches," Early says, with her characteristic silly humor smile, that camouflages to the large area. Porches and an attached three-car garage.

The original plans called for a detached garage connected to the house with a roof over a breezeway. The garage would, when it belonged to residents the footprint of the design but the breezeway was enclosed adding duration underpinned rooms to the house that the Rimers refer to as "The Jungle."

The studio, which in this age of computers may one day become the hobby / communications center, measures about 14 feet by 20 feet. It is lined with cabinets along the long sides and shares a gas-fired see through fireplace with the great room. Sliding glass doors lead out to the swimming pool area.

As noted, the home has many rooms and three and one half baths. There are three bedrooms, a den/office, a country size kitchen with a gourmet cooking area, a formal dining room

The pool overlooking unspoiled Florida woodlands.

The formal dining room looking toward the front foyer. The open doors lead to the den to the right front is an antique heather's desk.

a glass greenhouse and as mentioned the utility room and the studio, which could very well be called simply the Rivers Room.

The bedroom and den are along the south side of the house and are serviced by a separate air handler. This "zoning" is designed for conserve energy. Except for the kitchen, the utility room and the studio that are tiled, the floors are all hardwood accented with large area rugs.

The unusual decorations of the home is at the door, marked a bit with holiday wreaths bedecking the family's historic tree sitting brightly trimmed in the greenroom. The predominant color used throughout the living area for the walls and ceiling is green – a light shade. It was a special blend that Jim

Please see HOME on Page 3A

Highlands Has Full Plate For New Year

By DAVID SALLOWAY
Staff Writer
david.salloway@highlandstoday.com

SEBRING – The new year is almost here and Highlands County officials will have to hit the ground running despite hangovers.

The county courthouse will get the ball rolling at 8:30 a.m. Wednesday when it holds the final swearing-in ceremony for the newly elected county commissioners.

Commissioner Chairman Darrell "Hacker" Hollis and County Commissioner David Fleming each was hoping Wednesday's meeting would be the last one that.

Development Services Director Jim Polatty said one more probable vacant lot may need to be sold at least one of unwanted enforcement issues.

HOLLIS

COSTA

Beating drugs and bond issues were the primary campaign fodder the call for proposal plans of a solar mill district. County Staff proposed a proposed set of regulations based on studies of what best on the books in about a dozen other counties.

Commission members went over that ordinance paragraph by paragraph and some are ready to start up a proposed of three area.

In addition to finalizing the ordinances in order that commissioners can so decide if it wants to support right having the lowest elements may operate on county lakes. That question has prevailed lately debate among various interests and industry residents, who think the two issues of the item is only should be for the spring.

The county's planning and zoning commission will have a busy meeting Jan. 8 considering several proposed annexations, but the county's corporate-owner plans. There are plans for a business park near Lake Placid, a parkland complex on U.S. 27 and Lakeview Drive, at Sebring, and a drive-through restaurant at Sun n Lake of Sebring.

Business also will bring two projects to the county commissioners.

County Administrator Carl Cool will update Commissioners on how the law day went went in Sebring. The plan started first it was only a 2 months old last.

The program calls for county employees to work four 10 hour days. The latter's, retired Commander Airman Frank the government center and the road and bridge department on George Boulevard, south of Sebring, are closed Fridays. That brings savings in electricity and co-called services. Business usually conducted at these buildings now is handled on the personal floor of the government center, 600 S. Commerce Ave.

Cool reported at the end of the second month that the experiment went well and very well.

Commissioners also will receive a report on the recent survey of residents of the unincorporated area.

Please see HOLLIS on Page 3A

ACCIDENT

CONTINUED FROM PAGE 1

...to crash. Incidents with 20 gas leaks," Nicholls said Saturday. He praised the work of Florida Department of Emergency Management.

Nicholls said the leak occurred on a line that "he they were able to shut it off and evacuate from that gas pressure of gas escaping.

Nicholls carried a hazardous materials book listing the hazardous materials but study hazardous by Highlands County Hazard Sam Pure was Sandra Lasting study down on

...mmals and rides her gas out.

The sole part of the had these chemicals dangerously, could lead to the evacuation of people living and working within a nine-mile radius of the plant.

"The potential here is huge and I could have been a lot worse" Nichols said.

Larry Haddon, environmental health and safety manager for Cargill Citrus Pure, L.P., said the number of employees affected was 27, and the Highlands County Sheriff's Office evacuated it to be to county no 60.

According to Haddon, the hazardous had plant, located at 1600 ...SunPure Road, Avon Park, is normally being leased to 48 locations 80000, by Cargill as part of a limited partnership.

Haddon said 24 temporary contract, nine full-time Cargill employees and two Florida Department of Agriculture Inspectors were affected.

The Cargill employee was on an extraction area when the gas was known to be an exchange tube. The agriculture inspectors were working in their building which was a short distance from where the gas was released.

"It takes a very little amount of ammonia to irritate people who are real sensitive," Haddon said.

Lt. Jason Jamison, spokesperson for Highlands County Sheriff's Office said that the first calls to 911 on the scene was Deputy Mike Dekker. Dekker arrived shortly after 2 a.m.

Haddon reported to Division of the Florida Department of Agriculture Inspectors received a different blow of noting down numerous to these lines from a phalanx leak in a pipe that goes on the reservoir tank.

The leak, which is now contained upon exhausting low pressure, released between 10 and 40 pounds of ammonia.

Haddon put the number of pounds released at about to succeeding to a phase operation. However he said the warning board about 15 to 20 were, after.

Haddon did not what of the six plant was somewhat different from the one which leaked and how.

Had he said that the testing happens on a regularly held basis "just so the plant really would not be like it is. There is a personal safety head."

Haddon said the warning took place from a water supply outside 15 to 20 feet on the air.

The problem is it happened that any alkali change and although the

Please see LEAK on Page B-

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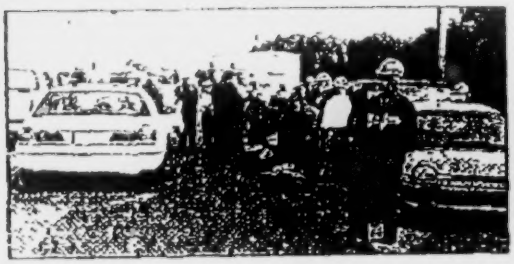

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OSHA Investigating Ammonia Leak At Cargill Citro Pure Plant

[illegible] — An accidental release of anhydrous ammonia gas from the Cargill Citro Pure plant on Sebring Parkway [illegible] Wednesday morning [illegible] Highlands County Fire Rescue Hazardous Materials Team [illegible] Sebring Parkway [illegible] Cargill Citro Pure plant [illegible]

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Anhydrous Ammonia Spill Day

By Patrick Coyle

Article Word Count: 659 (View Summary) Comments (0)

It looks like someone declared June 8, 2007 to be the day for serious Anhydrous Ammonia spills from refrigeration systems across the country. There were three separate instances of significant spills reported today. Mount Sterling, KY, Wyalusing, PA, and Milwaukie, OR all had releases in the last 24 hours. No one was killed, but a number of people were taken to the hospital, businesses were evacuated, and residents were told to shelter in place.

There were explosions associated with two of the incidents. There are reports that the ammonia leak at a Nestle Plant in Kentucky caused an explosion that blew down a wall at that plant; no injuries from the explosion or falling debris have been reported. The American Cold Storage facility in Oregon had an unexplained (as yet) explosion result in the ammonia leak. There were no reports of an explosion associated with the leak at Cargill Taylor Beef Plant in Pennsylvania.

Anhydrous Ammonia is favored in many large cooling systems because it has better heat transfer characteristics and is cheaper than the refrigerant gasses used in home cooling systems and refrigerators. The problem is that this material is very reactive and is classified as a Toxic by Inhalation gas. Fortunately, the gas is extremely irritating at well below the toxic level so that when a minor leak happens, unprotected people evacuate the area quickly with little urging. A catastrophic leak, however, can overcome people before they have a chance to get clear. This is partially because many people are temporarily blinded by less than lethal concentrations.

The food industry has long maintained that they should not have to comply with any handling restrictions on Anhydrous Ammonia required under various Federal laws, since they don?t actually handle Anhydrous Ammonia; it stays in a closed system. During the regulatory comment period they complained about being required to submit information under the new Chemical Facility Anti-terrorism standards based on the 7,500 pound Screening Threshold Quantity (STQ) listed in the proposed Appendix A, Chemicals of Interest, to 6 CFR part 27. Cooling systems having more than 7,500 pounds of Anhydrous Ammonia in the system would make that food processing company a ?Chemical Facility? under the rules of this regulation.

According to the EPA Risk Management Plan (RMP) guidance documents, 7,500 lbs of Anhydrous Ammonia released in 10 minutes time from a pressurized system (clearly a catastrophic leak, not a faulty valve) will have a plume with a toxic end point 3.2 miles down wind from the site of the leak (Table 9, 1.5 m/s wind speed). That means that anyone between the leak and 3.2 miles downwind could be exposed to dangerous concentrations of Anhydrous Ammonia.

Rather obviously, from the lack of casualties, none of these three release events came any where near 7,500 lbs in 10 minute release rate required for a 3.2 mile long toxic plume. There is nothing in any of the available article that tells anything about the release rate for

these accidents, but from the description they did not seem to be catastrophic release events. But what about the explosion caused by the release in Kentucky?

Anhydrous Ammonia is a very reactive chemical, and even by itself can form an explosive mixture when mixed with air at concentrations of 16 to 25% Ammonia in air, though it would require a strong ignition source. It reacts to produce explosive by-products when it mixes with Chlorine, Bromine or Iodine. Violent reactions occur with Bleach or Peroxides. It also forms explosive compounds with Gold, Silver and Mercury. So, while explosions are not part of the normal operating conditions of refrigeration systems using Anhydrous Ammonia as a refrigerant, an explosion after a significant leak would not be totally unexpected.

Just maybe, DHS was correct in setting the STQ limit for Anhydrous Ammonia at a low enough level so that some refrigeration plant users could be labeled as Chemical Facilities

Patrick J. Coyle has 15 years experience with the US Army, including a stint as a Physical Security NCO in Europe. He has also spent 12 years working as a Process Chemist is a specialty chemical manufacturing company.

Further information concerning the new regulations concerning protecting chemical plants from terrorist attack can be found at
http://www.members.aol.com/ChemPlantSec/ChemPlantSecurity.htm

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Ammonia Gas Death at Tyson Plant

SOUTH HUTCHINSON- One worker was killed and another hospitalized after an ammonia gas leak at the Tyson Foods Inc. plant.

While working at the Tyson Foods plant, a 51-year-old man was killed and a 55-year-old man was hospitalized with chemical burns after the accident. The men were refrigeration workers at the Tyson Foods plant. They came in contact with ammonia gas after a refrigeration line broke outside of the main plant at Tyson Foods Inc. This Tyson Food ammonia gas inhaltion accident happened on Nov. 1st, 2006.

Ammonia Gas Exposure Inhalation Lawsuit

The Willis Law Firm in Houston Texas has previously represented fiveworkers with ammonia gas inhation when they were exposed to high pressure ammonia gas at Western Packing Plant in Sealy Texas. The ammonia gas lines had been cut by a worker employed by another contractor and when the ammonia gas valve was opened, the high pressure ammonia gas engulfed about 15 workers, and seriously injuring six workers. The ammonia gas injuries ranged from severe lung damage, eye damage respritory damage. A ammonia gas lawsuit was settled out of court. For a Free Case Consultation concerning this Tyson Food accident or any other ammonia gas inhalation severe injury of death, call Houston, Texas Trial Lawyer for more information and help. Call Toll Free 1-800-883-9858.

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http://www.acusafe.com/Newsletter/Stories/0102News-Monthly/Incidents.htm
December 17, 2001 Florida Ammonia Leak Injures 9
Investigators probing a potentially fatal industrial accident at a Lake Wales citrus plant are concentrating on fittings sealing a 4-6 inch-diameter pipe that carried liquid ammonia from a juice chiller. Plant officials said that appears that an O-ring failed at the end of a pipe cap releasing anhydrous ammonia into the Citrosuco North America plant east of the city. Nine people including two state agriculture department employees and a federal agriculture worker were injured. Officials said members of Citrosuco's hazardous material team had already suited up and rescued three of the victims when firefighters arrived. Source: CSB CIRC

December 23, 2001 Custodial Worker Killed by Ammonia Leak
Wisconsin state officials are investigating an accident that killed an Oscar Mayer Foods custodial worker and injured one other when they were exposed to toxic gas leaking from a ruptured cooler tank. The two men were moving a tank of ammonia to a loading dock when a line broke, spilling 50 gallons of ammonia. Source: CSB CIRC

http://ehstoday.com/news/ehs_imp_35819/

Ammonia Leak Sours OSHA on Citrus Processing Plant

Jul 8, 2002 12:00 AM, By Sandy Smith

It wasn't the sweet smell of oranges and lemons employees smelled at a Lake Wales, Fla., citrus processing plant last December. It was ammonia, and it sent six workers to the hospital.

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Citrosuco North America faces $40,900 in proposed fines from the Occupational Safety and Health Administration (OSHA) after investigators found 41 serious violations of occupational safety and health standards.

"Each of those violations was serious enough that it could result in serious injury or even death if it's not corrected," said Les Grove, area director for the OSHA office in Tampa. "Citrosuco doesn't have a history of serious violations in the last three years," he added, saying the company received a 10 percent reduction in fines because of it.

OSHA inspectors began investigating the company when a seal on a pipe carrying anhydrous ammonia ruptured last year, releasing approximately 10,000 pounds of ammonia. Ammonia is used as a refrigerant at the facility.

The company was cited for failure to install a railing on a ramp, leaving a six-foot drop, failure to place quality control measures on seals of heat exchangers, poor recordkeeping, failing to make shut-off valves accessible in the event of an emergency and lack of proper training, among others.

The company declined comment. Citrosuco has until July 3 to contest the citations and proposed penalties with the independent Occupational Safety and Health Review Commission or to request an informal conference with the area director.

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CSB Investigative Team to Examine Fatal Ammonia Release near Columbia, South Carolina

July 15 2009

Washington, DC, July 15, 2009 – The U.S. Chemical Safety Board is deploying an investigation team to the site of an anhydrous ammonia release that occurred earlier today at Tanner Industries, located south of Swansea, South Carolina, the agency announced.

According to media reports a woman driving her car near the facility was overcome by the ammonia vapor and was fatally injured. Seven other individuals were taken to a local hospital for what were thought to be non-life threatening injuries.

Ammonia is a strong irritant that affects the respiratory system. It is a chemical used in a variety of industries, including the manufacture of fertilizers and in commercial refrigeration systems.

The CSB team will be headed by Investigation Supervisor Robert Hall, PE. Board Member William E. Wright will accompany the team and act as the chief spokesperson.

The CSB is an independent federal agency charged with investigating industrial chemical accidents. The agency's board members are appointed by the president and confirmed by the Senate. CSB investigations look into all aspects of chemical accidents, including physical causes such as equipment failure as well as inadequacies in regulations, industry standards, and safety management systems.

The Board does not issue citations or fines but does make safety recommendations to plants, industry organizations, labor groups, and regulatory agencies such as OSHA and EPA. Visit our website, www.csb.gov.

For more information, contact Public Affairs Specialist Amy McCormick (en location) cell 202.640.8945.

JUL 23 2010

Case No. 09-1558

IN THE
SUPREME COURT OF THE UNITED STATES

LORENE YOUNG

Petitioner,

v.

CARGILL, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Was Cargill entitled to summary judgment as a matter of law under applicable Florida law?

Is Cargill entitled to Employer Immunity based on Florida's Workers' Compensation Act, Section 440.11(2), Fla. Stat. §§440.01-440.60 (2000)?

Was Lorene Young appropriately deemed an "employee" of Cargill under Florida law?

Did the District Court and Court of Appeals err in concluding that summary judgment was appropriate under applicable Florida law?

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INTRODUCTION

Petitioner Lorene Young's ("Petitioner") Petition for Writ of Certiorari (the "Petition") highlights her fundamental misunderstanding of the role of the Supreme Court. She seeks to introduce new evidence, relitigate facts, and manufacture a split between circuits where one does not exist—all of which is not permitted at this level of review. Borrowing from the words of Justice Stewart, "the only remarkable thing about this case is its presence in this Court... [f]or the case involves no more than the application of well-settled principles to a familiar situation and has little significance except for the respondent." *Butz v. Glover Livestock Commission Co., Inc.* 411 U.S. 182, 189 (1973)(Stewart, dissenting).

STATEMENT OF THE CASE

In the fall of 2000, Cargill, Inc. ("Cargill") entered into a joint venture with SunPure, Limited, and began operating Avon Park, an existing juice processing facility, which was located in Frostproof, Florida.[1] The Avon Park facility processes oranges and grapefruits into either a concentrate form or ready-to-drink juice.[2]

---

[1] *See* Deposition of Larry Hadden, p. 14, attached as Ex. A to Cargill Juice North America, Inc.'s Motion for Summary Judgment.

[2] *See* Deposition of Larry Hadden, p. 17, attached as Ex. A to Cargill Juice North America, Inc.'s Motion for Summary Judgment.

Pursuant to the terms of a Service Agreement[3] with Cargill, KC Cromwell Inc. ("KC Cromwell") filled two job classifications at the facility: lead person/forklift and operator and general laborer, and also provided an on-site management team to supervise KC Cromwell's employees. *See Young v. Cargill Juice North America, Inc.*, 2008 U.S. Dist. LEXIS 100902 (M.D. Fla., Dec. 15, 2008)[4] at *2-3. The Service Agreement also required KC Cromwell to purchase and maintain certain types of insurance coverage, including workers' compensation insurance coverage. *Id.* at *4.

Petitioner was employed by KC Cromwell and was assigned to work at Cargill's Avon Park plant in October 2001. *Id.* at *3-4. Approximately one month later, she was promoted to "Lead Supervisor." *Id.* As a Lead Supervisor, Petitioner received work assignments and directed questions, concerns or complaints to a Cargill employee. *Id.*

Cargill uses anhydrous ammonia as part of its evaporation process to create juice concentrate. *Id.* at *4-5. On December 29, 2001, an ammonia release occurred, resulting in the evacuation of numerous employees to the hospital for evaluation. *Id.* at *5. Petitioner claims that she received "personal and psychological injuries" as a result of her exposure to ammonia. *Id.*

Petitioner received workers' compensation benefits for her medical expenses and lost wages

[3] The Service Agreement is attached to the Petition as Appendix F.

[4] Attached to the Petition as Appendix E.

arising out of the December 29, 2001 incident.[5] In addition, Petitioner filed a complaint asserting claims of intentional misconduct against both Cargill and K.C. Cromwell. *Young, supra*, at *6. Petitioner alleged that her injuries resulted from Cargill's failure to "properly inspect, maintain, and/or repair its equipment." *Id.* In addition, Petitioner alleged that Cargill knew that its equipment was in need of repair, that other ammonia leaks had occurred because of faulty or defective equipment, and that another ammonia leak was virtually certain to occur. *Id.* Petitioner further alleged that Cargill knew its equipment created a dangerous condition, but intentionally chose to disregard the danger and instructed its employees to work in these conditions without warning employees of the danger or implementing appropriate safety measures and training. *Id.* As one of its several affirmative defenses, Cargill asserted that Petitioner's claims were barred by the immunity conferred by Florida's workers' compensation law. *Id.* at *6-7.

After discovery, Petitioner moved to amend her complaint to add a claim of negligence against Cargill on May 8, 2008. *Id.* at *12. Cargill opposed Petitioner's motion because the incontrovertible evidence, including Petitioner's own factual allegations, demonstrated that Cargill was Petitioner's "statutory" or "special" employer within the meaning of the Florida's workers' compensation law and, thus, was immune from any claim of

---

[5] *See* Deposition of Lorene Young, pp. 217-218, which is attached as Ex. E to Cargill Juice North America, Inc.'s Motion for Summary Judgment.

negligence under Florida law. *Id.* The district court judge agreed and denied Petitioner's motion to amend as futile in an order dated May 28, 2008. *Id.*

Thereafter, the parties filed cross-motions for summary judgment on Petitioner's sole claim of intentional tort. *Id.* at *7-8. In an order and opinion dated December 15, 2008, the district court granted Cargill's motion for summary judgment, denied Petitioner's cross-motion for summary judgment, and dismissed the case in its entirety, with prejudice. *Id.* at *28-29. The district court held that Cargill qualified as a "special employer" for purposes of Florida workers' compensation immunity.[6] *Id.* at *13-14. Likewise, the court held that Petitioner had not established a genuine issue as to any material fact that might lead a jury to find that a reasonable employee in Cargill's position should have known that injury or death to Petitioner was substantially certain to occur. *Id.* at *28.

On appeal to the U.S. Court of Appeals for the Eleventh Circuit, Petitioner argued that the "intentional tort" exception to workers' compensation immunity applies to the facts of this case. *Young v. Cargill Juice North America, Inc.*, 242 Fed. Appx.

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[6] The district court specifically analyzed whether Cargill was a "special employer" under Florida's Workers' Compensation Act noting that workers' compensation immunity extends to employers that utilize "the services of employees of a help supply service company, as set forth in Standard Code Number 7363" when such employees are acting in furtherance of the employer's business. Fla. Stat. §440.11(2). *Young*, U.S. Dist. LEXIS 100902 at *10-14, which is attached as Appendix E to the Petition.

585, 585 (11th Cir., Sept. 9, 2009).[7] The court of appeals disagreed and affirmed the granting of summary judgment. *Id.* Thereafter, Petitioner filed the Petition with this Court.

REASONS FOR DENYING THE PETITION

A petition for a writ of certiorari will be granted only for one of the following compelling reasons:

- a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

- a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals; or

- a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an

[7] Attached to the Petition as Appendix G.

> important federal question in a way that conflicts with relevant decisions of this Court.

Sup. Ct. R. 10 ("Review on a writ of certiorari is not a matter of right, but of judicial discretion."). A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. *Id.*

A. The Court Of Appeals' Decision Does Not Conflict With The Decision Of Any Other Court Of Appeals Or With Any Decision Of This Court.

The Court has stated that it is "very important" that it be consistent in not granting the writ of certiorari except in cases "involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority ***between the circuit courts of appeal.***" *See Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923)(dismissing writ of certiorari improvidently granted after Court determined that the circuits were not in conflict). (Emphasis added). Petitioner claims her Petition should be granted because of a conflict between the Middle District of Florida, the Ninth Circuit Court of Appeals, and a state appellate court in Ohio regarding: (1) what constitutes a genuine issue of material fact; (2) what constitutes the difference between an employee and an independent contractor; and (3) what constitutes gross

negligence.[8] But this argument must fall from its own weight.

First, Petitioner has not established that a conflict exists between circuit courts of appeal, but merely claims a conflict between: (1) a district court in Florida; (2) a circuit court; and (3) an Ohio appellate court.[9] As this is not a split between the circuit courts of appeals, this is insufficient to warrant Supreme Court review. *See* Sup. Ct. R. 1; *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951)(Supreme Court will grant certiorari "only in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.").

Second, no such conflict exists. Petitioner cites to a myriad of inapposite cases and statutes, including three bankruptcy cases and an irrelevant South Carolina case, in which the court held that an employer properly fired employees for their gross negligence.[10] None of these cases or statutes demonstrate a split between courts.

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[8] *See* Petition, p. 26. At first, Petitioner claims that there "is a conflict of decisions between the Middle District of Florida and the 9th Circuit Court of Appeals and the Appellate court of Ohio," about what "institutes a genuine material issue of fact." Petition, p. 10. In her conclusion, Petitioner expands her argument by claiming conflicts in several areas of state law.

[9] *See* Petition, p. 26.

[10] *See* Petition, pp. 24-26.

This case involves a district court's routine application of well-established law. The standard used to decide whether summary judgment is appropriate is determined by federal procedural law; however, "the materiality of the facts is determined with reference to the applicable substantive law." *Textron Fin. Corp. v. Lentine Marine Inc.*, 630 F. Supp. 2d 1352, 1355 (S.D. Fla. 2009), citing *Allen v. Tyson Foods*, 121 F.3d 642, 646 (11th Cir. Ala. 1997). In diversity suits, the substantive law is generally the law in the forum state in which the district court sits. *Id.* Accordingly, the district court in this case used the summary judgment standard under Fed. R. Civ. P. 56, but applied Florida law in determining the materiality of the facts.[11]

The Court of Appeals' decision in this case clearly tracks settled law. Florida law specifically extends workers' compensation immunity to an employer who uses the employees of a "help supply services company." Fla. Stat. §440.11. "An employee so engaged by the employer shall be considered a borrowed employee of the employer, and, for the purposes of this section, shall be treated as any other employee of the employer." Fla. Stat. §440.11(2). Employee leasing companies, temporary help services, and labor pools are "help supply service companies" for purposes of the Florida workers' compensation laws. *See Caramico v. Arteraft Indus. Inc.*, 727 S. 2d 348, 349 (Fla. 5th Dist. 1999). To be entitled to immunity, employers in Florida need only "utilize the service" of the help supply company

[11] The district court decision is attached as Appendix C to the Petition.

employee and the employee must be "acting in furtherance of the employer's business." Fla. Stat. §440.11. Such employers are "liable for and shall secure the payment of compensation to all such borrowed employees as required in Fla. Stat. §440.10, except when such payment has been secured by the help supply services company." *Id.*

In this case, it was undisputed that Petitioner was employed as a day-to-day employee by KC Cromwell, a "help supply services company."[12] Pursuant to the Service Agreement between Cargill and KC Cromwell, Cargill requested, and KC Cromwell provided, Petitioner and other temporary employees to work at the Avon Park facility to further Cargill's business. *Id.* at *2-3. And pursuant to the Service Agreement between KC Cromwell and Cargill, KC Cromwell maintained workers' compensation for Petitioner—and Petitioner received workers' compensation benefits for her alleged injuries pertaining to the incident on December 29, 2001. *Id.*[13] In other words, Cargill fulfilled its responsibilities and obligations as a statutory employer under Fla. Stat. §449.11(2) and secured payment of compensation to Petitioner through KC Cromwell, a "help supply services company" within the meaning of the Act. *See also, Latite Roofing & Sheet Metal Co. v. Barker*, 886 So.2d 1064 (Fla. 4th Dist. 2004)(where a roofing company had made sure that a subcontracted employer of an injured worker

[12] *See Young*, 2008 U.S. Dist. LEXIS 100902 at *2-4, 11, attached to the Petition as Appendix E.

[13] *See also*, Deposition of Lorene Young, pp. 217-218 which is attached as Ex. E to Cargill Juice North America, Inc.'s Motion for Summary Judgment.

had compensation coverage for the worker's injury on the subcontracted job, the roofing company was entitled to workers compensation immunity as a statutory employer); *Stephens v. Gencorp, Inc.*, 549 So.2d 1051 (Fla. 4th Dist. 1989)(in negligence action brought by an employee, the employer was immune from liability because the employer was the statutory employer and because the employee had received workers compensation benefits).

Petitioner's attempts to draw a parallel between this case and the *Crawford* case are misguided. *Crawford v. Florida Steel Corp*, 478 So.2d 855 (Fla. 1st Dist. 1985). In *Crawford*, there was no contract between the general and special employer, a factor that the court found to be "essential to the special employee status" required to establish workers' compensation immunity. In stark contrast, in this case, Cargill and KC Cromwell had a detailed Service Agreement regarding the borrowed employees' services and specified which company was responsible for paying for workers' compensation for those borrowed employees.[14] Accordingly, the *Crawford* case is mapposite.

B. Petitioner Cites To Non-Florida Law In Her Attempt To Manufacture A Conflict Where None Exists.

As to questions controlled by state law, conflict among circuits is not of itself a reason for granting a writ of certiorari especially when the

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[14] *Young*, 2008 U.S. Dist. LEXIS 100902 at *2-3 attached to the Petition as Appendix E.

conflict is merely corollary to a permissible difference of opinion in the state court. *Ruhlin v. New York Life Insurance Co.*, 304 U.S. 202, 206 (1938). Historically, the workers' compensation statutes arose on a state-by-state basis because of the general failures of the tort system to afford adequate relief to workers injured in the course of their employment. PROSSER AND KEETON ON TORTS (5th Ed. West 1984), pp. 568-574. *See Scott v. Amec Kamtech, Inc.*, 583 F. Supp. 2d 912, 918-919 (E.D. Tenn. 2008)(noting different results under Texas and Tennessee workers compensation frameworks in a choice of law case).

Congress itself has expressed its intention to grant states the discretion to administer their workers' compensation free from federal court intervention. Under 28 U.S.C. 1445(c), a civil action in any state court arising out of the workers' compensation laws of such state may not be removed to federal court. The statute "reflects a congressional concern for .the states' interest in administering their own workers' compensation schemes." *Vasquez v. North County Transit District*, 292 F.3d 1049, 1061, n.6 (9th Cir. 2002). Thus, whether a company is granted immunity for negligence under Florida's workers' compensation statute, does not, and should not, control whether that same company under identical circumstances would be granted workers' compensation immunity under Ohio's workers' compensation statute, or any other similar state statute. Accordingly, Petitioner's certified questions are controlled by state law and not properly before this Court.

C. Petitioner Is Trying To Relitigate Facts.

In her Petition, Petitioner is merely trying to relitigate facts and debate the sufficiency of evidence which has already been weighed by the district court. In an attempt to cloud the issues in this case and create a federal question or a conflict among the circuits where there is none, Petitioner goes even further and attempts to introduce evidence that was not part of the record before the Eleventh Circuit Court of Appeals and is not admissible at this stage of review. The introduction and reliance on new evidence at this stage of review is inappropriate. *Holmes v. Trout*, 32 U.S. 171, 210 (1833)("No evidence can be looked into in this court, which exercises an appellate jurisdiction, that was not before the circuit court; and the evidence certified with the record must be considered here, as the only evidence before the court below.").

D. The Petition Does Not Present Any Question Of Exceptional Importance Worthy Of This Court's Attention.

This is a personal injury case that may have significant importance to Petitioner, as an unsuccessful litigant, but does not involve principles of importance to the public at large. Petitioner makes a fleeting reference to great public interest in "the environmental concerns about how green our planet should [be]."[15] Yet, this case does not involve federal environmental statutes or regulations, nor does it involve personal injuries affecting large

[15] *See* Petition, p. 26.

numbers of Americans. Quite simply, this is a personal injury case involving an isolated ammonia release on December 29, 2001--and to Cargill's knowledge, Petitioner was the only individual to ever have claimed to have suffered more than minor irritation from the ammonia release.[16] For this additional reason, the petition should be denied.

CONCLUSION

For all of the above referenced reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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[16] *See* Affidavit of Larry Hadden at ¶6, which is attached to Cargill Juice North America, Inc.'s Motion for Summary Judgment

Supreme Court, U.S.
FILED

Case No. 09-1558

IN THE SUPREME COURT OF THE UNITED STATES

LORENE YOUNG

Petitioner,

v.

CARGILL

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Is Cargill entitled to summary judgment as a matter of law?

Whether Cargill is entitled to Employer Immunity based on Florida's Workers Compensation Act Section 440.11 (2) Fla. Stat. §440.01- 440.60 (2000).

Was Lorene Young considered an employee of Cargill?

Did Cargill know or should have known of the dangers of the use Anhydrous Ammonia.

Did the District Court and Court of Appeals err in concluding that summary judgment was appropriate under applicable Florida law?

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B. Conflicts exist between various state laws and federal decisions.

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Other Authorities

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Source URL: www.ktka.com/news/2006/nov/13/cargill_inc_facing_osha_citations_and_fi...

Introduction

The respondent has not quoted the Supreme Courts Rule number 10 properly. Therefore it is the respondent who misunderstands the role of the Supreme Court. Redress of grievances.

Reasons for denying respondents reply.

Respondent states that "A petition for a writ of certiorari will be granted **only** for one of the following compelling reasons:"[1] This is a misstatement of Rule 10. The rule actually states:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. **The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:**[2](Bold added for emphasis on missing phrase.)

With that being noted there is a conflict between Florida courts of Appeals and the decision of the US District Court for the Middle District of Florida. As stated in Rule 10 §(a).

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[1] Respondents reply brief page 5

[2] Sup. Ct. R 10.

The US District Court for the Middle District of Florida and The District Court of Appeals' for the 11th Circuit decisions Do Conflict with the Decisions of the 1st District Court of Appeals the 2nd District, and the 5th District, of Florida.

There is a conflict with Crawford v. Florida Steel 478 So.2d 855 (1985) (Fla.1st District), Austin v. Duval County School Board 657 So. 2d 945 (1995) (Fla.1st District), Venezia v. Eagan 671 So. 2d 175 (1996) (Fla. 5th District),The respondent states that the parallel between Crawford and the present case is misguided, because there was no contract between the general and special employer,(in the Crawford case) in this case there is a detailed Service Agreement and in that agreement Section 8 states that the Company(Citrus Force Staffing) is considered an Independent Contractor.

> "Company shall act at all times as an independent contractor, and nothing contained herein shall be construed to create the relationship of principal and agent, or employer and employee between Company and Cargill. The Company employees assigned to perform the Services for Cargill are solely the employees of Company."[3]

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[3] Petitioners Writ Appendix F.

Clause 12 covers insurance responsibilities including workers compensation.[4] In Exhibit A of the services agreement is outlined the responsibilities of the Company including management and team leaders.[5] Therefore if in Crawford there was no service contract and the summary judgment was denied, then certainly with a service agreement that specifically states that the company is an independent contractor (a material fact)again summary judgment should be denied.

> The three-part test for an employment relationship is: (1) whether there is a contract of hire, express or implied, between an employee and the special employer; (2) whether the work being done at the time of the injury is essentially that of the special employer, and (3) whether the special employer has the right to control the details of the work. *Stuyvesant Corp. v. Waterhouse, 74 So. 2d 554, 557 (Fla. 1954).* The contract for hire is the most important part of the test, because the employee loses the right to sue the special employer at common law for

[4] *Id.*
[5] *Id.*

negligence when he enters the new employment relationship. [6]

"[T]here is a presumption that the employee is not a borrowed servant, [*957] but instead continues to work for and be an employee of the general employer." *Sagarino v. Marriott Corp., 644 So. 2d 162, 165 (Fla. 4th DCA 1994)* [**8] (citing *Shelby Mut. Ins. Co. v. Aetna Ins. Co., 246 So. 2d 98 (Fla. 1971)*). To overcome this presumption, a party must establish the following elements: (1) there was a contract for hire, either express or implied, between the special employer and the employee; (2) the work being done at the time of the injury was essentially that of the special employer; and (3) the power to control the details of the work resided with the special employer. *Sagarino, 644 So. 2d at 165* (citing *Shelby Mut. Ins. Co., 246 So. 2d at 101, n.5*). The first factor, whether there was an express or implied contract, is the critical element. *Decogatis v. Fawcett Mem'l Hosp., 892 So. 2d 1079, 1081 (Fla. 2d DCA 2004)* (citing *Horn v. Tandem Health Care of Fla., Inc., 862 So. 2d 938, 940*

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[6] *Austin v The Duval County School Board*, 657 So. 2d 945 (1995)

(Fla. 2d DCA 2004). The remaining two factors are indicia of such a contract. *Id.*[7]

There was limited access to certain equipment in the plant by Cromwell employees and there were actual Cargill employees' at the plant who were segregated from Cromwell employees and were responsible for maintaining certain equipment.

> the presumption of continued general employment makes particularly good sense in those situations where an employee is provided for the specific purpose of operating heavy equipment belonging to the lending employer because the lending employer, who owns expensive and often complex machinery, would naturally prefer to continue control and maintenance of that machinery, and thus be reluctant to lease his equipment without also sending along an employee who has knowledge of the equipment and an interest in seeing that the equipment is used and maintained properly.[8]

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[7] *Biggins v Fantasma Productions* 943 So. 2d 952 (2006)

[8] *Venezia v. Eagan* 671 So. 2d 175 (1996)

There is conflict between the United States Court of Appeals for the Ninth Circuit, and the United States Court of Appeals for the Eleventh Circuit.

In *Vasquez v. North County Transit District*, 292 F.3d, 1049 (2002), summary judgment was reversed because the protection that the defendant claimed (assumption of risk) was deemed not applicable. Therefore the decision of the United States Court of Appeals for the 11th Circuit in this case is in conflict with the United States Court of Appeals for the 9th Circuit.

Petitioner believes that there is a conflict between this case and several states (including Florida).
The respondent states that under 28 U.S.C. 1445(c), a civil action in any state court arising out of the workers' compensation laws of such state may not be removed to federal court.[9] However, in the instant case it was respondent that removed this case from state to federal court. The way that several states define their workers and employers are in direct contrast to the way that Florida defines workers and employers and the respondents reply states that

[9] Respondent reply brief page 11.

the US District Court for the Middle District of Florida used Florida Law to decide that summary judgment was appropriate for Cargill.

Respondent is not trying to re-litigate the facts.
Respondent in section C of the reply brief cites *Holmes v. Trout*, 32 U.S. 171, 210(1833) contending that new evidence was introduced however, this is not the case, petitioner has added the complete service agreement that the order from the middle district of Florida references on page two of the order.[10]
The respondent states that there is no question of exceptional importance worth of this court's attention.
However, as the petitioner stated in the appellate brief, there is a question of material fact that needs to be defined by this court.

> Even under the virtually certain test, there must not be a disputed issue of material fact in order for summary judgment to be given to the requesting party. If "The employer engaged in conduct that the employer knew, based on prior similar accidents or on explicit warnings specifically identifying a known

[10] Appendix E of Petitioners Writ.

> danger, was virtually certain to result in injury or death to the employee."[11] Summary judgment should not be given. However, at the time of Mrs. Young's accident, the standard was a different standard, a standard that allows a lower threshold to be met, the determination of conduct of the employer required the tryer of fact to decide "whether the employer either knew or should have known that its conduct was substantially certain to result in injury or death." [12]

"If the evidence raises any issue of material fact, if it is conflicting, if it will permit different reasonable inferences, or if it tends to **[*840]** prove the issues, it should be submitted to the jury as a question of fact to be determined by it." *Moore, 475 So. 2d at 668* (citations omitted). Trial courts must be especially cautious in granting summary judgment in negligence cases, and "summary judgment should not be granted

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[11] *Cabrera v. T.J. Pavement Corp.* 2 So 3d 996 Nov. 19, 2008.

[12] *Id.*

unless the facts are so crystallized that nothing remains but questions of [**6] law." Id.[13]

> [t]o the extent that the federal cases permit summary judgment based on *Federal Rule of Civil Procedure 56* as interpreted in *Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 265 (1986)*, they are of limited precedential value in Florida summary judgment cases. Florida [**16] places a higher burden on a party moving for summary judgment in state court, requiring the movant to: "[S]how conclusively that no material issues remain for trial." [14]

Respondent states that this case is an isolated ammonia release. However, the respondent had an ammonia spill in Minnesota in October of 2000.[15] Respondent had an ammonia spill before this incident and after this incident in

[13] *Bruno v. Destiny Transportation* 921 So. 2d 836 (2006)

[14] *Casamassima v. The US Life Insurance Co.* 958 So. 2d 1093 (2007)

[15] Appendix D of Writ for Certiorari.

March 2008 and has been accused of literally destroying the lives of its workers.[16]

> ...an accident is classified according to Cargill's universal lexicon not as a "lost-time accident" but as "first aid," a "slight accident without time off" and the worker is relocated "with his/her consent" and with signed documentation to an area where he/she can work without discomfort to the injured body part.[17] The subcontractors do the most dangerous work. They are the Cargill employees who die every year all over the world because they work without any kind of security. They are the ones who prune trees, clean toilets and lift heavy sacks. They do all the jobs with a higher probability of a serious or deadly accident. They work on scaffoldings, in silos and with machinery where it's easy to get

[16] Cargill: In the Belly of the Beast by William Grigsby Vergara http://www.envio.org.ni/articulo/4183

[17] *Id*

> hurt. They work in their own country like migrants who work abroad do- for less pay and without rights. They are the ones who die anonymously,...[18]

Cargill is being sued for knowingly sourcing from cocoa plantations that use child slave labor.[19]

> The federal government and ten states sued Cargill Inc. for failing to comply with emissions standards outlined in the Clean Air Act. The lawsuit came after the discovery that Cargill's corn processing plants were a major source of carbon monoxide and volatile organic compounds. The company reached a settlement in the suit by agreeing to spend $130 million to upgrade the pollution control devices at its plants. In addition, Cargill agreed to pay $1.6 million in civil penalties and to

[18] Cargill: In the Belly of the Beast by William Grigsby Vergara http://www.envio.org.ni/articulo/4183

[19] www.greenamericatoday.org

earmark $3.5 million for environmental projects across the country. Improved pollution controls at Cargill facilities are expected to reduce annual emissions by 30,000 tons.

-- Environmental Protection Action, 09/01/2005[20]

An affidavit released by Immigration and Customs Enforcement (ICE) in March 2009 alleged that the Cargill Meat Solutions plant in Dayton, Virginia knowingly hired around 400 "unauthorized and smuggled aliens." The affidavit was used to secure a search warrant for a March 2008 raid of the plant after it was found that nearly one third of the 1,300 I-9 employment forms submitted to the Department of Homeland Security by Cargill were suspected to have been filled out using "fraudulently obtained or invalid documents." ICE investigators also found

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[20] yosemite.epa.gov/opa/admpress.nsf/2467feca603687298525735900404443d/f36...

evidence that pregnant women were also treated differently in the plant, being forced to work up until they gave birth and made to start working again soon after delivery.

-- WHSV, 04/22/2009[21]

The International Labor Rights Fund (ILRF) has sued Nestlé, Archer Daniels Midland, and Cargill in Federal District Court in Los Angeles for involvement in the trafficking, torture, and forced labor of children who cultivate and harvest cocoa beans that the companies import from Africa. They filed suit on behalf of a class of Malian children who were trafficked from Mali into the Ivory Coast and forced to work twelve to fourteen hours a day with no pay, little food and sleep, and frequent beatings. The three children acting as class representative plaintiffs are proceeding anonymously as John Does

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SourceURL: www.whsv.com/news/headlines/43439297.html

because of feared retaliation by the farm owners for whom they worked.

-- International Labor Rights Fund, 07/13/2005[22]

According a report by the Environmental Justice Foundation, a London-based nonprofit dedicated to stopping environmental abuses, titled "White Gold: The True Cost of Cotton," an Environmental Justice Foundation report, the Cargill Cotton division of Cargill Incorporated is a major purchaser of Uzbek cotton. Government control of the lucrative cotton industry in Uzbekistan has led to widespread human rights abuses and extreme poverty. International human rights organizations warn that leaders of Uzbekistan have turned the country into a "slave nation" in order to cheaply produce cotton for the world market. According to the Environment Justice Foundation, Uzbekistan is the world's second largest

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[22] Source URL: www.laborrights.org/stop-child-labor/cocoa-campaign/585

exporter of cotton, earning the country more than $1 billion in exports annually. The Karimov government employs unethical and abusive policies to reap the maximum benefit from Uzbekistan's desirable natural resource:

- Every year, over 200,000 children are conscripted to manually harvest cotton. Schools are closed and children as young as seven are forced to inhabit camps on cotton farms. The children are given high picking quotas and most are not compensated for their labor. They subsist on bread and water, and many suffer from malnutrition as a result of hard labor and little food. Adult laborers typically earn less than $7 USD per month. [23]

- On June 14, 2006, Scott Grossoehme, a Cargill employee in North Topeka, died in a grain elevator accident. As a result, the Occupational Safety and Health Administration (OSHA) fined Cargill $22,500 for seven alleged violations of

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[23] Source URL: www.cfoundation.org/page152.html

> federal rules, including a failure to adequately train employees, exposing them to the risk of being buried by the grain, and not providing lifelines to employees who walk or stand in stored grain. This was the second death in Cargill elevators in less than three years. [24]

Conclusion

For all of the above reasons, the petitioner asks this honorable court to grant the petition for writ of certiorari.

Respectfully submitted,

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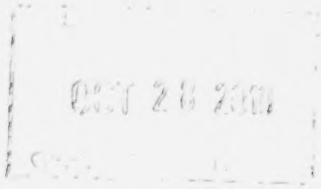
[24] Source URL: www.ktka.com/news/2006/nov/13/cargill_inc_facing_osha_citations_and_fi...



Case No. 09-1558

IN THE SUPREME COURT OF THE UNITED STATES

LORENE YOUNG
Petitioner,

v.

CARGILL
Respondent.

ON PETITION FOR A WRIT OF CERTIORAI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR RECONSIDERATION/REHEARING

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Attorney for Petitioner

QUESTIONS PRESENTED

WILL THE UNITED STATES FILE ADDITIONAL CHARGES AGAINST CARGILL FOR VARIOUS OTHER ENVIRONMENTAL VIOLATIONS?

DOES CARGILL EMPLOY UNDOCUMENTED WORKERS PURPOSELY TOAVOID EMPLOYER LIABILITY, THUSLY DEMONSTRATING A SYSTEMATIC PATTER OF ABUSE TOWARDS ITS WOKERS INJURED AT ITS PROCESSING PLANTS?

IS CARGILL'S SYSTEMATIC AVOIDANCEE OF RESPONSIBILITY A FORM OF CONTEMPT OF THE LAW?

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Dated December 17,2001
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no.09-2048 the United States Court of
Appeals for the First Circuit .
Barnett v Bank of America no. 3D09-1326
Third District Court of Appeal for the
State of Florida.

PETITION FOR REHEARING

Petitioner respectfully requests that this court grant rehearing/reconsideration of its order dated October 4, 2010, which denied certiorari, and that the Court now grant certiorari.

INTRODUCTION

On December 29, 2001, at approximately 7 a.m., Ms. Lorene Young was injured in an anhydrous ammonia gas explosion at Cargill's citrus processing plant in Avon Park, Fl. More than thirty employees, largely Hispanic, were taken to local hospitals in the area for treatment. Anhydrous ammonia, in use for refrigeration, was stored in large ammonia receivers and piped throughout the plant.[1] After the accident, top plant officials met to discuss an action plan to eliminate ammonia relief valves from relieving at ground level. According to handwritten notes of a meeting held with administrators Ray Spurlock (Maintenance Manager),

[1] See appendix A exhibit labeled CAR00121

Larry Hadden (Environmental Health and Safety Manager), Mike Loudermilk (Safety Supervisor), Mike Maloney (Citrus Force-Safety Supervisor), Bill Brey (Director of Operations), Hiram Saylor (Refrigeration Maintenance), and Gary Cutral (Citrus Force-Supervisor), a suction valve had been closed prior to the accident. They discussed the valve's similarity to a water hose valve and how it could have closed inadvertently. When the evaporator's operator turned off the essence units, the relief valve immediately closed. With nowhere to escape, pressure built up inside the pipes and triggered the release of ammonia by the relief valve.

The notes from the meeting indicate that the relief valve was vented to the atmosphere at ground level.[2] The design of the relief valve vent should have been piped at a higher elevation. Also, according to other documents, the weather was such that the conditions were ideal for *keeping* ammonia vapors down at the ground level.[3]

[2] See Appendix B exhibit labeled CAR00026

[3] See Appendix C for exhibit CAR 00063

The hand written notes also indicate that the warning system was inadequate and discussed another facility's warning system, Citrus Suco which had an ammonia spill on December 13,2001.[4]

> OSHA issued a citation on June 27, 2002 that included reference to the December 29, 2001 accident and states in part: The employer did not conduct refrigeration process to address *at a minimum* the following: The hazards of the process; Engineering and administrative controls applicable to the hazards and their interrelationships such as appropriate application of detection methodologies for early warning of releases; consequences of failure of engineering and administrative controls; facility siting; human factors; a qualitative evaluation of a range of the possible safety and health effects of failure of controls on employees. [5]

[4] See Appendix E for article from Lakeland Ledger Dated December 17, 2001.

[5] See Appendix D Exhibit CAR00034

(emphasis added).

An Incident Investigation Report also indicated that some of the basic causes contributing to the accident were the engineering design and maintenance of the suction valve.[6]

REASONS FOR GRANTING REHEARING/RECONSIDERATION.

A petition for rehearing upon denial of a petition for certiorari is permitted when limited to "...intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented." Rule 44.2, Rules of the Supreme Court.

Since denial of Mrs. Youngs' writ the following intervening and controlling cases were decided.

On October 8, 2010, the United States Court of Appeals for the First Circuit rendered a decision in **Bielunos v. Misty Dawn Inc.** no.09-2048 and a copy of the opinion is annexed hereto.

[6] See Appendix E Exhibit CAR00066

This case is comparable to the present case in all material respects except for its opposite result. Bielunas was working as a commercial fisherman on the F/V SEA WATCHER I when his right foot was crushed in a ghastly accident. An orthopedic surgeon said it looked like someone had taken a sledgehammer to Bielunas's foot. His livelihood lost, Bielunas later sued the vessel's owner, F/V Misty Dawn, Inc., charging Jones Act negligence, ship unseaworthiness, and a right to maintenance and cure. A jury returned a verdict in Bielunas's favor, and the district judge entered judgment against Misty Dawn for $2,307,690. To make the venture as profitable as possible, Misty Dawn stored clam cages on the walkways. With the walkways blocked, crew members looking to traverse the ship had to sidle along a thin, unguarded ledge overlooking a nine-foot drop into the cargo hold or amble over a conveyor belt.
The court stated there is no mathematical formula for determining the monetary equivalent of non-economic injuries. Quoting ,Limone v. United States, 579 F.3d 79, 105 (1st Cir.2009).

The court also stated that the facts, measured under the legal criteria outlined above, support the district judge's decision not to pare down the award.

Also after writ was denied in the present case, on October 16, 2010, the Third District Court of Appeals for the State of Florida rendered a decision in **Barnett v Bank of America** No.3D09-1326

> In 2002, the plaintiff in this case was the manager at Bank of America's Bay Harbor Island branch. The bank was a tenant on the first floor of a building at 1108 Kane Concourse. The landlord decided to renovate the building, and Bank of America agreed to construct a new banking facility on the first floor.
> Bank of America wished to keep its branch open during the renovations. It constructed a temporary banking center occupying part of its preexisting space. The bank employees were moved into that space in May or June of 2002.

The plans called for a one-hour rated fire wall to be built from floor to ceiling which would separate the temporary banking center from the construction area. According to the testimony of the plaintiff as well as two other employees, the wall was not built in accordance with the plans, did not run up to the ceiling, and did not completely separate the temporary banking center from the construction area.

According to the depositions, the opening between the construction area and the temporary banking center allowed a constant influx of dust, odors, and fumes.

Each day the computers and tables were covered by a thick layer of dust, including concrete dust and fiberglass particles. The employees were breathing dust and fumes from glue, paints and paint thinners. There was no operable air conditioning system.

According to the depositions, within several weeks the plaintiff and other employees started becoming ill from this exposure with asthma, bronchitis, sinus problems, nose bleeds, headaches, and dermatitis. (Since the accident in the present case, Ms. Young has suffered from asthmatic bronchitis and nose bleeds.) Eight of the twelve employees made claims for health problems.

According to the deposition testimony, the plaintiff and other employees contacted executives from Bank of America to complain. The plaintiff, as manager, requested that the employees be moved to another location or that the bank bring a trailer to the site to house the temporary bank facility. The executives refused these requests because the branch had a safe deposit area which the bank wanted to keep open for its customers. The plaintiff was ordered to keep her employees working at the existing site.

Eventually the bank brought in fans and a cleaning crew. After employees began making workers' compensation claims, the bank also brought in air purifiers and coolers. The employees, however, kept getting sick. In December 2002, the bank temporarily closed the facility but then reopened it. Finally in January 2003, the bank shut down the temporary center and moved the employees to another site. The plaintiff brought suit against the bank and other defendants for injuries she sustained. The bank moved for summary judgment on the basis of workers' compensation immunity. The bank maintained that the firewall separating the construction area from the temporary bank facility reached all the way to the ceiling, and not partway as the employees testified. The bank argued that it prepared its plans using qualified design professionals and pulled the appropriate building permits.

> The bank denied that any of the air from the construction area entered the bank's temporary facility. The bank argued that it responded properly to the employee complaints and that as of December 2002, interior air testing revealed that the air quality in the building was within a normal range.

The court concluded that the employer "engaged in conduct which was substantially certain to result in injury or death." This case questioned "whether a reasonable person would understand that the employers conduct was 'substantially certain' to result in injury or death to the employee." Under this approach, the employers actual intent is not controlling.

Evidence of the relief valve's dangerous location (in the instant case) is currently an unaddressed issue of material fact relevant to the intentional tort exception to Florida's Workers Compensation employer immunity clause.

The intentional tort exception applies if the employer **engaged in conduct that a reasonable person would view as "substantially certain to result in *injury or death*."** *Bourassa v. Busch Entertainment*, 929 So.2d 552, 556 (2006). Young was required to access an area she was unaware would certainly expose her to noxious levels of ammonia if the release valves operated properly upon trigger. Her injuries resulted from Cargill's failure to disclose the location of the relief valve to employees working in close proximity to the refrigerant systems and to adhere to engineering designs that would allow the relief valves to fulfill their purpose safely. The suction valve's inadvertent placement also implicate a disregard for the serious gravity of harm its mishandling could cause.

QUESTIONS PRESENTED.

WILL THE UNITED STATES FILE ADDITIONAL CHARGES AGAINST CARGILL FOR VARIOUS OTHER ENVIRONMENTAL VIOLATIONS?

In the United States Court of Appeals for the Eight Circuit the government through the Environmental Protection Agency has filed suit against Cargill. In **United States v. Cargill** 10-2732 the government issued Cargill various citations for air pollution and Cargill has not complied with governmental regulations, and since some of the violations start as early as January 1997 and litigation is in progress, it is feasible that the United States may amend their complaint to include violations of OSHA regulations in Cargill's' Florida plants.

The court in **In RE: Cargill Fertilizer** stated On September 5, 2004, **Cargill** reported the breach of a gypsum dam within the System, resulting in the discharge of partially neutralized or untreated process wastewater into waters of the State.

Cargill has managed to stop the flow and temporarily plug the breach. However, the System continues to be in the "must-treat" trigger status specified in *40 CFR 418.13* and Chapter 62-672 of the Florida Administrative Code, with process wastewater levels at or near the maximum emergency elevations. These emergency levels cannot be sustained over a long period of time without compromising the integrity of the dam structure. Cargill's third-party engineer has recommended that levels within Cargill's cooling pond be lowered as soon as possible to prevent a catastrophic failure resulting in severe harm to human health and the environment. The department of Environmental Protection entered the following order (in part): Cargill is hereby ordered to take immediate actions to stabilize ... dams at the Facility to prevent a catastrophic release of untreated wastewater from the Facility. Actions to permanently stabilize the area ... shall be completed as soon as practicable.

Cargill shall lower the water level in the cooling pond at the Facility to the level recommended by Cargill's third party engineer as soon as practicable. Cargill shall continue current operations to transfer process wastewater from the cooling pond at the Facility to the top of the Closed Stack until filled to its capacity, and shall maintain adequate freeboard to contain weather events associated with a 25-year/24 hour storm event. Cargill shall complete the first batch treatment of process wastewater from the cooling pond with caustic soda or other suitable neutralizing agent, and temporarily store this water in the storm water swale located at the base of the active gypsum stack, and shall discharge such batch treated water as needed to avoid a catastrophic failure of the facility process wastewater containment system. The process wastewater neutralization shall be continued as rapidly as practicable until completed.

Cargill shall submit plans within 24 hours of the time of receipt of this Order to the Department for review and approval to neutralize a minimum volume of 100 million gallons of process wastewater with caustic soda, lime or other suitable neutralizing agent in other compartments in the cooling pond or other ponds on site. Any actions taken by **Cargill** under this Immediate Final Order shall not be construed to limit the Department's exercise of its enforcement authority...,(nor shall Cargill)cause damage to natural resources. In the United States District Court for the Middle District of Florida, Tampa Division, **Gates v WR Grace et al(Cargill is a named defendant)** case no: 8:08 cv-2560-t-27TBM Mr. Gates, the plaintiff alleged that Cargill and the other defendants (successors in interest) negligently released and discharged toxic contaminants into the ground water aquifer system, which spread into Mr. Gates' well which he used for drinking and cooking, Mr. Gates also alleged that Cargill released and discharged toxic contamminants into the air and soil upon his property.

According to deposition in the current case, Cargill's Avon Park Plant had several OSHA violations that were never corrected.

DOES CARGILL EMPLOY UNDOCUMENTED WORKERS PURPOSELY TOAVOID EMPLOYER LIABILITY, THUSLY DEMONSTRATING A SYSTEMATIC PATTERN OF ABUSE TOWARDS ITS WOKERS INJURED AT ITS PROCESSING PLANTS?

In this case Cargill employed many undocumented workers some whom were injured in the explosion of December 2001.[7] In the 5th Circuit court of Appeals the case of **Espinoza v Cargill** no: 09 11170. The plaintiff also worked in a processing plant that employed mostly undocumented workers.

[7] See Carla Rushings' affidavit paragraph 10. in Appendix B of Writ of Certorari

IS CARGILL'S SYSTEMATIC AVOIDANCEE OF RESPONSIBILITY A FORM OF CONTEMPT OF THE LAW?

On October 6, 2010 the United States District Court for the Northern District of Iowa, Eastern Division **Ney Leasing Corporation Inc. v. Cargill Meat Logistics Solutions** No 2:09-cv-01051.

In a contract dispute Cargill was denied summary judgment, the court stated "Summary judgment is not appropriate if the non-moving party can set forth specific facts, by affidavit, deposition, or other evidence, showing a genuine issue for trial." quoting **Baum v. Helget Gas Products, Inc.**, 440 F.3d 1019, 1022 (8th Cir. 2006) The court in Ney also stated, "A party's entitlement to plead alternative theories of recovery should not be confused with the election-of-remedies rule." This case is set for trial on November 8, 2010. In the United States District Court for the District of Columbia the court in **United States of America v Cargill Inc.** No 99-1875 the court ordered Cargill to divest interest in grain elevators around the country based on the

Antitrust Procedures and Penalties Act 15 U.S.C.§ 16.

Since there now exists a clear and express conflict of decisions among the circuits on an important question of federal law affecting many people in different parts of the country, compelling reasons are evident why the questions presented should be reviewed and definitively determined by this court.

CONCLUSION

For the reasons set forth in this petition for rehearing, as well as in the petition for certiorari previously filed, rehearing and certiorari should now be granted.

CERTIFICATION OF COUNSEL

Counsel of record for petitioner, does promise that this petition for rehearing complies with Supreme Court Rule Number44 and the grounds presented are solely based on that rule and that this petition has not been presented for delay of time and has been presented in good faith.
Respectfully Submitted,

Marcia Vestylena Forsett
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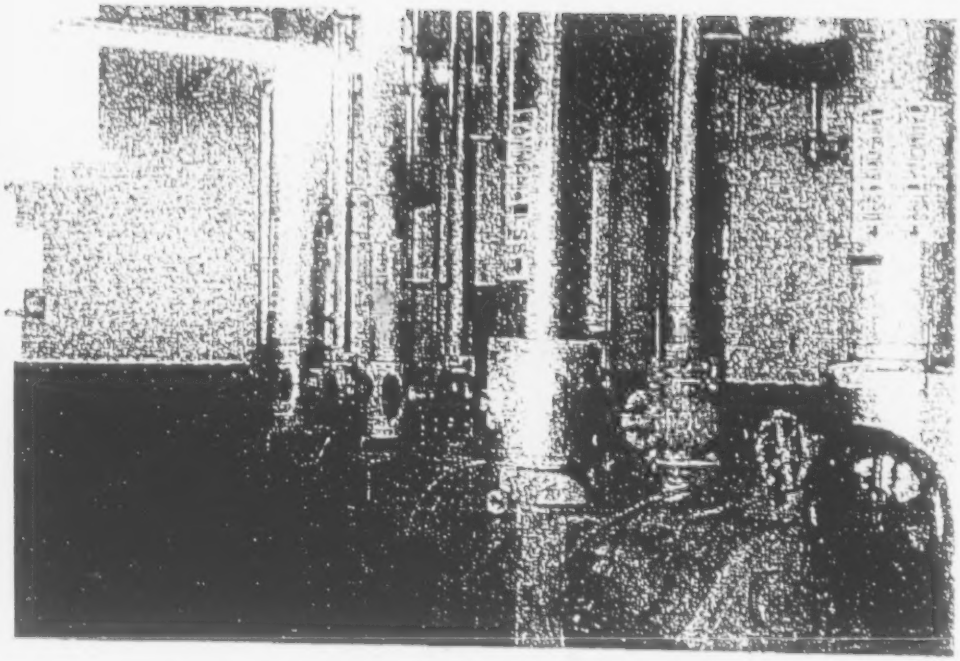
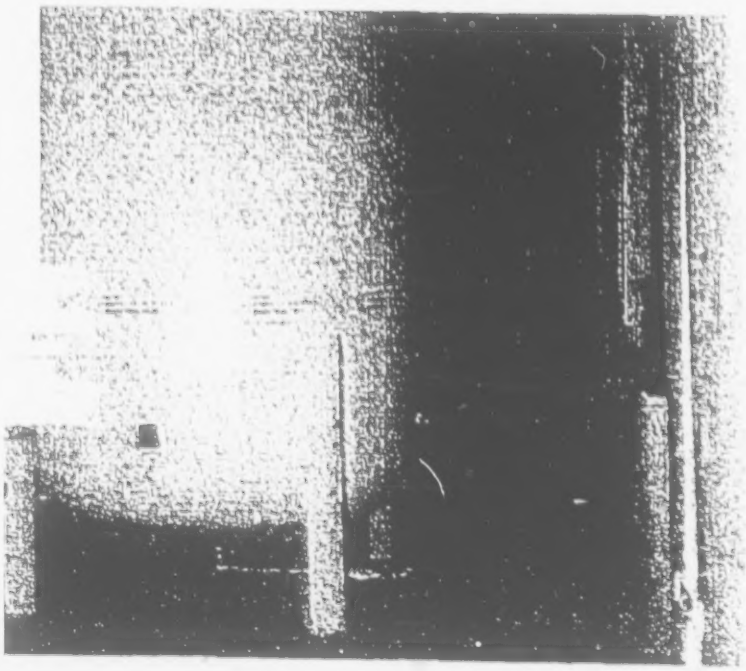
Frostproof, FL 33843
863-605-5359 phone
863-582-9359 fax

APPENDIX
A





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APPENDIX
B

(MB)

Follow up on Ammonia incident

Heading:

Ray Spurlock	Maintenance Mgr
Larry Hooten	EHS Manager
Mike Vandermiff	Safety Supervisor
Mike Maloney	Citrus Force - Safety Supervisor
Bill Brey	Director of operations.
Miriam Saylor	Refrigeration maintenance
Gary Cutrel	Citrus Force Supervisor - I-4
Robert Sarapeza	Citrus Force Supervisor - AG

Discussed citrus force personnel status.

Talked about action plan as to eliminate relief valve from relieving at ground level. Tied back into system.

All agreed about 7:10 AM incident occured. The relief valve vented to atmosphere at ground level. Refrigeration operator said less than 15 seconds. Robert walked out of office and could smell the ammonia. Wind was blowing the ammonia towards the parking lot. (South / South East) Robert has a roster of both shifts signed in. Discussion on how soon the plant shift Supervisor has the roster of temp employees. Citrus Belle uses a hand horn to notify plant personnel to muster. Will look at audible alarm system to notify employees of need to evacuate.

Group discussed the operation of the essence recovery unit. The evaporator operator turned off the essence units off and immediately the relief valves. The suction valve after investigation was found closed. The valve looks similar to a water hose valve and could have closed inadvertently. The design of the relief valve vent should have been piped above grade. Temporary we will remove handles from suction valves. Discussed relocating suction valves above tanks. A full count press will be placed on valve and line identification, assessment of relief valves and where they vent. Write procedure for startup this system. Till a permanent audible system is installed, we will buy portable horns and have a muster point Monday morning.

APPENDIX
C

Loudermilk, Mike /fros

From: Hadden, Larry /fros
Sent: Saturday, December 29, 2001 2:12 PM
To: Abrahamson, Tom /fros; Botos, Joseph /tdqt; Brady, Bill /tdqt; Damasin, Michael /tdqt; Jason, Greg /tdqt; Kelly, Bryce /fros; Larson, Stephen /tdqt
Cc: Bryant, Mike /fros; Ellis, Glenda /fros; Everett, Gene /fros; Hadden, Larry /fros; Loudermilk, Mike /fros; Matthiesen, Todd /fros; Plair, Larry /fros; Respress, Kevin /fros; Roberts, Gary /fros; Spurlock, Ray /fros; Stueve, Larry /fros; Tucker, Gene /fros
Subject: Avon Park ammonia incident

Saturday, 12/29/01, approximately 7:10 a.m. (during shift change), our Avon Park, Fl. facility had an ammonia related incident that involved having 27 personnel being taken to the hospital to be checked out.

The initial investigation has determined the following:

During the juice evaporation process, there is a water phase essence receiving/holding tank (capacity, approx. 1,006gals), that is ammonia jacketed to keep the product chilled for preservation. The tank is designed with a relief valve in the event of excessive pressure build up within the ammonia system. If the incoming product (water phase essence), is not chilled sufficiently prior to entering the tank, the refrigerant (liquid ammonia), within the jacket of the tank will begin to boil (rapid expansion) and create enough pressure for the system to relieve itself via the relief valve. At this time, this is what we and the operator believes happened.
When the ammonia system vented itself, there was an ammonia vapor cloud that was created for approximately 15-30 seconds, with less than 10 pounds released. The weather conditions at the time were, an approaching cold front with overcast skys, the air temperature was approximately 60 degrees F., a light mist of rain, with winds out of the south, conditions ideal for keeping ammonia vapors down at ground level.
The incident occurred during shift change when we had some employees arriving for work and some preparing to leave. The ammonia vapor was carried in the general direction of the parking lot/entrance to the plant, where the highest number of personnel was. When the smell of ammonia was reported, the security guard immediately called 911. he did not contact the on duty shift supervisor to discuss a response to the situation. The 911 dispatcher immediately dispatched emergency response teams from the Highlands County area, that included fire rescue trucks, ambulances and sheriff's department personnel.
During the incident, the plant was evacuated. The emergency medical personnel determined that there were a total of 27 people that had enough exposure that they should be taken to area hospitals to be checked over. The total included, one (1) Cargill Citro Pure employee, two (2) Florida Department of Agriculture Inspectors and twenty four (24) temporary Citrusforce employees. The situation was under control and the plant back in operation within an hour of the incident.

At the time of this report, the Cargill Citro Pure employee was released to return to work with only eye irritation. The contract employees were taken to three different area hospitals. We've received word that 7 have been checked out and released. We are still awaiting word from their management concerning the status of the other 17.

After the incident, after discussions with Bryce Kelly and Larry Weir, I provided statements to the news media, Highlands Today and the Highlands County Sun, concerning the facts of the incident. I gave them my name as the contact person for the incident. This wire will provide you with enough information for INTERNAL questions.
PLEASE REFER ALL EXTERNAL INQUIRIES OF THE INCIDENT TO EITHER BRYCE KELLY, LARRY WEIR OR MYSELF

CAR 00063

APPENDIX
D

S. Department of Labor
cupational Safety and Health Administration

Inspection Number: 304986334
Inspection Dates: 01/16/2002 -
Issuance Date: 06/27/2002

Citation and Notification of Penalty

Company Name: Cargill Citro Pure, L.P
Inspection Site: 1552 Sun Pure Road, Avon Park, FL 33825

The alleged violations below have been grouped because they involve similar or related hazards that may increase the potential for injury resulting from an accident.

Citation 1 Item 2a Type of Violation: Serious

29 CFR 1910.119(e)(1) The process hazard analysis was not conducted as soon as possible or in accordance with the schedule presented in 29 CFR 1910.119(e)(1)(i) through (e)(1)(v):

a At the site, employees were involved in citrus juice manufacturing operations where a refrigeration system was used containing approximately 29,000 pounds of anhydrous ammonia. The employer did not conduct Process Hazard Analysis for the refrigeration process to address at a minimum the following:

The hazards of the process;

- Engineering and administrative controls applicable to the hazards and their interrelationships such as appropriate application of detection methodologies for early warning of releases;

3. Consequences of failure of engineering and administrative controls;

4. Facility siting;

5. Human factors;

6. A qualitative evaluation of a range of the possible safety and health effects of failure of controls on employees.

Safety and health issues encountered during the inspection include but are not limited to the lack of any type of a suppression system such as a rapid deluge system; shut-off valves were not easily accessible in the event of an emergency; no alarms or sensors and no warning devices were available in all areas where ammonia was used as a refrigerant; no evaluation of facility siting and employee work areas to assure safe passage in the event of a release; no evaluation of human factors; no evaluation of hazardous location and use of explosion proof equipment in areas where ammonia is likely to be present in the event of an emergency; no evaluation for the need of emergency escape respirators from areas where ammonia is used and stored; no preventive maintenance programs, procedures and administrative controls were in place to assure the ongoing integrity of the vessels and equipment to include safe operating procedures and mechanical integrity procedures.

"ABATEMENT DOCUMENTATTION REQUIRED"

---

ee pages 1 through 4 of this Citation and Notification of Penalty for information on employer and employee rights and responsibilities.

APPENDIX
E

INCIDENT INVESTIGATION REPORT -- FOR EMPLOYEE INJURY, PROPERTY DAMAGE AND NEAR MISS REPORTING

INSTRUCTIONS SEE BACK OF FORM

THIRD PARTY INCIDENTS SHOULD BE INVESTIGATED USING A GENERAL LIABILITY FORM

This form and the information contained in it will be used by the company's legal advisors in the event of litigation

1 General Info

☑ Injury/Illness ☐ Property Damage ☐ Near Miss | CRITICAL? ☐ Yes ☐ No | LOCATION CODE: (AVON PARK, FL.) 13467 | CLAIM(S) FILED? ☑ Yes ☐ No

COMPANY NAME: Cargill Citro Pure, L.P. | PLANT LOCATION (City, State or Country): Avon Park, FL. | EXPLICIT AREA (Dept, Building, Area, Etc): Highlands Co. Evaporation Essence Holding Tanks

CLAIMS ADJUSTER NOTIFIED? ☐ Yes ☐ No ☐ N/A | TIME OF THE INCIDENT: 7 10 ☑ AM ☐ PM | DATE OF INCIDENT occurred: 12, 29, 01 | DATE INCIDENT REPORTED: 12, 29, 01 | DATE OF CLAIM REPORTED TO CARRIER: 12, 29, 01

2 Personal Injury Section

NAME (First, Last, Middle Initial): ** Multiple persons (SEE LIST ATTACHED) | DESCRIPTION OF INJURED PERSON(S): 1 - Company employee 2 - FL Dept. of Ag. 3 - Cargill Citrus 4 - Temporary Laborers (34) | ENTERED ON OSHA LOG? ☐ Yes ☐ No | ACCIDENT CATEGORY: ☐ Lost Time ☑ Medical Aid

LENGTH OF EMPLOYMENT: 4.3Y - Temp. Labor (Hospitalized) | LENGTH IN PRESENT JOB: | SHIFT: ☑ 1st ☐ 2nd ☐ 3rd ☑ Rotating | DRUG TEST: ☑ Yes ☐ No

NATURE OF INJURY: Irritation | BODY PART AFFECTED: Lungs / eyes | CAUSE OF INJURY: Chemical contact / exposure

3 Property Damage Section

EQUIPMENT DAMAGED: N/A | $ VALUE | LOST PRODUCTION THAT CANNOT BE RECOVERED: | $ VALUE

PRODUCT DAMAGED: N/A | $ VALUE | OTHER: | $ VALUE

CAUSE OF LOSS: N/A | TOTAL $ LOSS

4 Description

DETAILED EVENTS LEADING TO THE INCIDENT:
- Evaporator Essence Holding Tanks vented to atmosphere for a few seconds creating a vapor cloud of Ammonia for 15-30 seconds. Wind blew cloud in general direction of Temporaries coming on shift and FDA Lab. Exhaust operation suction fans drew cloud in area.

WHAT ACTS OR CONDITIONS CONTRIBUTED DIRECTLY TO THE INCIDENT?:
- Ammonia tank vented (guards for protection) to atmosphere

WHAT PERSONAL AND JOB FACTORS CONTRIBUTED TO THE INCIDENT?:
- Mental/psychological stress - Engineering design / wear & tear
*** Maintenance - suction valve (1") closed prior to incident, by person(s) unknown - Valve handles removed to prevent future closure by (Management)

5 Prevention

PROBABILITY OF EVENT RECURRING: ☐ Likely ☑ Possible ☐ Unlikely | SEVERITY POTENTIAL: ☐ Major ☑ Serious ☐ Minor | EXPOSURE FREQUENCY: ☐ Frequent ☑ Occasional ☐ Rare

IMMEDIATE FIX - WHAT WAS DONE TO CORRECT THE ACTION THAT HAS BEEN TAKEN TO PREVENT A RECURRENCE?:
- Tanks Ammonia system closed off & locked out until manufacturer can inspect system for any problems (ie) leaks or vent valve integrity.

PERMANENT MEASURES - WHAT CORRECTIVE ACTION HAS BEEN OR WILL BE TAKEN TO ELIMINATE THE SUBJECT EVENT?:
- Will inspect, repair if needed and redesign vent valve system if determined necessary. (Pipe vent valves above 15' ht.) 1/02/02
*** Handles removed from Suction Valve (1")

6 Signatures

DRUG/ALCOHOL TEST COMPLETED? ☐ Yes ☐ No | DATE PREVENTION COMPLETED:

REPORTED BY: Larry Flair / Madden | DATE: | INVESTIGATED BY: Ray Sosebee | DATE: | DATE INVESTIGATION COMPLETED:

REVIEWED BY: | DATE REVIEWED:

EHS 562 REV 7/99 DISTRIBUTION: WHITE - Corporate Safety; Copy YELLOW - Business Unit Copy; PINK - Plant Manager's Copy

* Report updated on 12/31/01, when list of hospitalized temporary laborers was received. (FFH)
** Report updated on 1/02/02, when the complete temporary laborer list was received. (FFH)
*** Report updated on 1/23/02 - gave copy to OSHA Inspector - Christos (FFH)

CAR 00066

APPENDIX
F

Local & State

■ Obituaries, p.4
■ State News, p.5

DATELINES

LAKE WALES

Ammonia Leak Hospitalizes 5

Five workers were taken to area hospitals after an ammonia leak at the Citrosuco North America plant on State Road 60, said Larry Alexander, Polk County director of public safety.

The leak occurred about 9 p.m. inside the processing plant at 5937 S.R. 60 E., Alexander said.

Five people who inhaled ammonia were taken to area hospitals, a plant supervisor said. Two were in serious condition.

Their names were not available late Monday night.

Lake Alfred Manager Resigns

Jim Drumm is offered a $39,740 settlement for stepping down.

By MELISSA GREEN
The Ledger

Commission unanimously approved an agreement that provides for his resignation in exchange for a $39,740 settlement.

Drumm

"I think it's a was a good resolution.

"I know that I have not done anything wrong," Drumm said. "However, the commission still has the prerogative to dismiss me."

He had been put on paid leave earlier this month, and City Clerk Jan Shockley was named interim city manager.

QUESTIONING SUSPECTS

Lab Test May Shed Light on

APPENDIX
G

BIELUNAS v. MISTY DAWN INC
Wojciech BIELUNAS, Plaintiff, Appellee,
v. F/V MISTY DAWN, INC., Defendant,
Appellant.
No. 09-2048.
-- October 08, 2010

Before BOUDIN, GAJARSAand THOMPSON, Circuit Judges.*

Joseph A. Regan, with whom John David Blaisdell and Regan & Kelley LLP were on brief, for appellant.Joseph S. Stacey, with whom James P. Jacobsen and Beard Stacey & Jacobsen LLP were on brief, for appellee.

This case-according to Wojciech Bielunas-is about life-altering pain. Working as a commercial fisherman aboard the F/V SEA WATCHER I, Bielunas had his right foot crushed in a ghastly accident. An orthopedic surgeon said it looked like someone had taken a sledgehammer to Bielunas's foot. His livelihood lost, Bielunas later sued the vessel's owner, F/V Misty Dawn, Inc., charging Jones Act negligence,[1] ship unseaworthiness, and a right to maintenance and cure.[2] A jury returned a verdict in Bielunas's favor, and the district judge entered judgment against Misty Dawn for $2,307,690. In this arena, Misty

Dawn criticizes the district judge for admitting certain evidence and denying a motion for new trial or remittitur. Detecting no hint of reversible error, we affirm the judgment below.

Background

We present the facts in the light most flattering to the jury's verdict. See, e.g., Whitfield v. Melendez-Rivera, 431 F.3d 1, 3 (1st Cir.2005). Bielunas emigrated from Poland to the United States with his family in 1995, eventually settling in rural Pennsylvania. He had worked on fishing boats before leaving Poland, and he became a commercial fisherman here. From 2005 through 2006, Bielunas worked for Misty Dawn, a Massachusetts corporation, on its vessel, the SEA WATCHER.

Safety was hardly the watchword for Misty Dawn's conduct. The company made no real effort to ensure that its employees complied with accepted safety standards. Misty Dawn had some safety guidelines, but they were not posted anywhere on the SEA WATCHER. Instead, the company relied on word-of-mouth, with ownership passing safety concerns to the captain who then passed them on to the crew. But there is some dispute whether ownership

ever did this.

To make the venture as profitable as possible, Misty Dawn stored clam cages on the walkways. With the walkways blocked, crew members looking to traverse the ship had to sidle along a thin, unguarded ledge overlooking a nine-foot drop into the cargo hold or amble over a conveyor belt. But the conveyor belt was not a realistic option because the belt was quite slippery and the system lacked adequate handrails, so the crew (including the captain) opted to shimmy along the hatch ledge. Apparently no one told them not to do this.

That brings us to the accident. Asked to help close the hatch that covered the cargo hold, Bielunas had to indicate to another crew member when the cover was in the proper position-a wire cable attached to a hydraulically-powered machine would haul the hatch forward along the ledge. Ideally, one would perform this job by standing on the designated walkways. But because they were blocked, Bielunas rode atop the closing hatch cover-that is how he and others had done it before, and no one had ever told him to do it differently. Unfortunately, he lost his balance, stepped onto the ledge to keep from falling

into the cargo hold, and got his right foot caught between the cover and a protruding piece of metal. "Stop, stop," Bielunas yelled, hoping to get the attention of the seaman operating the hydraulically-powered machine. Bielunas could feel steel pressing into him, crushing his foot. Flesh and muscle were stripped off the bone, leaving a gaping hole. Blood was everywhere.

The Coast Guard airlifted Bielunas to a hospital on Cape Cod, where a doctor performed a series of emergency surgeries. The doctor noticed that about half of the bone material was dead. He removed the dead matter and a significant amount of dead muscle and tissue, too, but he could not close the wound. Eventually, after nearly two months, doctors sealed the opening, but Bielunas's foot is still disfigured, and the damage is severe, permanent, and degenerative. As if this were not enough, Bielunas walks with a pronounced limp, and his altered gait triggered back and knee problems. Bielunas will never be able to return to any form of hard work. His poor English skills make it highly unlikely that he will ever be able to do office or clerical work. Because this work is the only kind of

employment that a person with his new physical disability would be capable of performing, Bielunas will likely never be able to work again-he can even cross-off pizza delivery and security guard from any list of potential jobs because his mangled foot affects his driving and ability to patrol a site, too.

Bielunas's total medical and economic damages approximated $762,000. In his opening statement, Bielunas's lawyer pushed for a $2,500,000 damages award, which he upped to $3,328,767 in his closing. The jury returned a $2,775,000 verdict against Misty Dawn but also found Bielunas 15% comparatively negligent. Factoring in the 15% figure and an agreed-upon set-off between the parties, the district judge entered a $2,307,690 judgment in Bielunas's favor. Misty Dawn moved for a new trial or a remittitur, which the district denied in an unexplained order.

With this background in place, we turn to the issues presented on appeal, highlighting further facts when needed to put Misty Dawn's claims into proper perspective.

Evidentiary Issues

Misty Dawn contends that the district

judge erred in admitting plaintiff's exhibit 32 and Lawson Bronson's expert testimony. Neither claim has traction.

Plaintiff's exhibit 32

The protested exhibit is a staged photo (apparently taken by a defense expert) of a deckhand holding a wire and sidling along a nine-inch hatch ledge, as the SEA WATCHER's crew frequently would. Misty Dawn argues here, as it did below, that the exhibit is irrelevant because Bielunas was injured while standing on the moving hatch cover-not while traveling along the hatch ledge holding a wire. This argument is easily disposed of. A relevancy-based argument is usually a tough sell. The definition of relevance is quite expansive: relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence" more or less probable. See Fed.R.Evid. 401 (emphasis added). To be relevant, the evidence need not definitively resolve a key issue in the case, see, e.g., United States v. Rivera Calderón, 578 F.3d 78, 96-97 (1st Cir.2009), cert. denied, 130 S.Ct. 1107 (2010)-it need only move the inquiry forward to some degree, see 2 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence §

401.04[2][b] (Joseph M. McLaughlin ed., 2d ed.2010). Because this is a quintessential judgment call, see Morales Feliciano v. Rullán, 378 F.3d 42, 57 (1st Cir.2004), we give trial judges considerable leeway in deciding whether the contested evidence satisfies this not-too-difficult-to-meet standard, reversing only on a showing of abuse of discretion, see, e.g., United States v. Sepulveda, 15 F.3d 1161, 1194 (1st Cir.1993).

Relevancy is not assessed in a vacuum-it is gauged "in light of the underlying substantive law," see Roy v. The Austin Co., 194 F.3d 840, 843 (7th Cir.1999), here, Jones Act negligence and ship unseaworthiness. A Jones Act shipowner must see "to the safety of the crew." Koehler v. Presque-Isle Transp. Co., 141 F.2d 490, 491 (2d Cir.1944) (Frank, J.). A crew member's burden of proving causation is "featherweight," meaning liability exists if the shipowner's "negligence contributed even in the slightest" to the injury. Ferrara v. A. & V. Fishing, Inc., 99 F.3d 449, 453 (1st Cir.1996) (quotation marks omitted). Also, a shipowner must keep the ship-its decks, passageways, equipment, etc.-in a

seaworthy condition and must use safe work methods, too. See id. And a shipowner is responsible for unseaworthiness-induced injuries even if not negligent. See id.

If a picture speaks a thousand words, this one spoke plenty, giving context so the jury could better understand the parties' actions. Again, the photo showed a seaman inching his way along a tiny hatch ledge with no guardrails while lugging a wire-an unacceptable practice, Bielunas's expert said, which Misty Dawn turned a blind eye to and which highlighted Misty Dawn's cavalier attitude toward safety. The photo also showed a ship with blocked walkways, which further bolstered Bielunas's theory that Misty Dawn failed to provide a safe deck for work on the high seas. Misty Dawn talked a good game about how crew safety was a top concern, but the photo suggested otherwise. Seen in this light, then, the photo tended to make Misty Dawn's negligence and the ship's unseaworthiness more probable, see generally DeGioia v. United States Lines Co., 304 F.2d 421, 423 (2d Cir.1962) (holding that a cluttered deck constitutes Jones Act negligence and vessel unseaworthiness); Bonnewell v. United

States, 170 F.2d 411, 412-13 (4th Cir.1948) (same)-which is all the liberal relevancy standard requires, see, e.g., Iacobucci v. Boulter, 193 F.3d 14, 20 (1st Cir.1999). Consequently, the district judge did not abuse his broad discretion in admitting plaintiff's exhibit 32.

Bronson's testimony

Also sailing wide of the mark is Misty Dawn's claim that the district judge stumbled in admitting Bronson's testimony about the means of traversing the deck, the danger of obstructing the walkways, and other safety problems on the SEA WATCHER. Misty Dawn calls this testimony irrelevant and says its admission affected the verdict (Misty Dawn does not contest Bronson's expert credentials)-which means we apply the abuse-of-discretion standard. See, e.g., Pagés-Ramírez v. Ramírez-González, 605 F.3d 109, 115-16 (1st Cir.2010). Again, that standard is hard to satisfy, and Misty Dawn cannot satisfy it here.

Bronson's testimony-discussing the meaning and significance of the staged photo, the dangers posed by the open hatch covers and the missing conveyor belt handrails, etc.-went to matters of consequence: did Misty Dawn provide

Bielunas with a safe work place, and was the SEA WATCHER seaworthy? Misty Dawn protests that Bielunas was not hurt while sidling along the hatch ledge (a Misty Dawn-accepted practice that Bronson condemned), that only one cover was open when tragedy struck, and that the missing handrails played no part in the mishap (ignoring that Misty Dawn had faulted Bielunas for not standing on the conveyor belt during the hatch-closing episode, a ridiculously unsafe suggestion, Bronson said, given the lack of handrails). But this evidence gave the jury a proper frame of reference for assessing the parties' competing claims, so it is relevant. See Faigin v. Kelly, 184 F.3d 67, 81 (1st Cir.1999). Misty Dawn could and did fight tooth and nail to undermine the evidence's meaning. But once relevancy is found, complaints of the sort Misty Dawn pursues go to the weight, not the admissibility, of Bronson's testimony. See, e.g., United States v. Schultz, 333 F .3d 393, 416 (2d Cir.2003); United States v. Diaz, 878 F.2d 608, 615 (2d Cir.1989). The upshot of all this is that we do not see anything close to an abuse of discretion here.[3]

The New Trial/Remittitur Issues

In its post-trial motion, Misty Dawn blasted Biclunas's counsel for suggesting a damage award in his opening statement ($2,500,000) and closing argument ($3,328,767), saying counsel's comments unfairly influenced the jury and entitled it to a new trial. Misty Dawn also contended that the jury's ultimate award ($2,775,000, constituting roughly $2,000,000 in non-economic damages, which is the crux of the matter) was simply too large to stand. The district judge denied the motion without comment, so we have two choices: remand for clarification or address the issue head-on "if a reasonable basis supporting the order is made manifest on the record ." United States v. Podolsky, 158 F.3d 12, 16 (1st Cir.1998); see also generally Presley v. United States Postal Serv., 317 F.3d 167, 173 (2d Cir.2003) (noting that "[w]hile a written explanation of a district court's basis for denying [a new-trial motion] is certainly preferable as an aid to appellate review, a separate written opinion is not necessarily required when a district court" rebuffs the motion). We choose option two in this instance.

Suggesting specific damage amount

Misty Dawn did not object to the

specific-damage-award comments in Bielunas's counsel's opening statement and closing summation. Rather, it first surfaced this issue in its new-trial motion. That is still an unpreserved challenge, however, so our review is limited to a search for plain error. United States v. Brandao, 539 F.3d 44, 57 (1st Cir.2008); accord Springer v. Henry, 435 F.3d 268, 283 (3d Cir.2006).

Plain error is one hard test to meet, particularly in civil litigation. See Smith v. Kmart Corp., 177 F.3d 19, 26 (1st Cir.1999). Plain error is (1) error which (2) is so clear that a trial judge should act even without an objection and which (3) affects the appellant's substantial rights-on top of that, even if the appellant makes this required showing, we need not intervene unless the error also (4) seriously impugns the "fairness, integrity, or public reputation of judicial proceedings." United States v. Roy, 506 F.3d 28, 30 (1st Cir.2007) (quotation marks omitted); see also Smith, 177 F.3d at 25; Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. West Lake Acad., 548 F.3d 8, 22 (1st Cir .2008). Consequently, Misty Dawn faces a steep climb nearing 90 degrees-ultimately, that slope is

insurmountable.

Misty Dawn cites no First Circuit cases banning lawyers from suggesting a damage number to the jury. Instead it says that federal courts tend to let counsel make unit-of-time arguments during summation (e.g., a lawyer tells the jury plaintiff's pain is worth X dollars per day, month, or year and then multiplies it by plaintiff's life expectancy to get a lump-sum figure). Bielunas's lawyer did just that, proposing a number and discussing a process through which the jury could reach it.[4]

Some courts permit unit-of-time arguments, some leave the matter to the trial judge's discretion, and some ban the practice outright-though most courts, particularly federal courts, seem to fall into the first two camps. See generally Mileski v. Long Island R.R. Co., 499 F.2d 1169, 1173 n. 2, n. 3, n. 4 (2d Cir.1974) (collecting federal and state cases); Giant Food Inc. v. Satterfield, 603 A.2d 877, 879-80 (Md.Ct.Spec.App.1992) (same). Not this Court, however. We forbid counsel from asking jurors to consider the amount of a party's ad damnum in crafting a damage award, see Davis v. Browning-Ferris Indus., Inc., 898 F.2d

836, 837-38 (1st Cir.1990); see also Wilson v. Bradlees of New England, Inc., 250 F.3d 10, 23 n. 25 (1st Cir.2001)-and we have cited approvingly a case outside this circuit for the point that lawyers cannot state in summation the number they think jurors should award for pain and suffering. See Davis, 898 F.2d at 837 (highlighting Waldorf v. Shuta, 896 F.2d 723 (3d Cir.1990)). Building on this foundation, we held in an unpublished opinion that Davis precludes counsel from requesting a pain-and-suffering dollar amount in closing. Kimberly F. v. Mary Hitchcock Mem. Hosp. & Hitchcock Clinics, Inc., No. 93-1438, 1993 WL 498026, at *9-10 (1st Cir. Dec. 3, 1993) (unpublished). Consistent with the Davis line of cases, district judges in this circuit have stopped lawyers from doing just that. See Wilson, 250 F.3d at 23 n. 25; see also generally Budet-Correa v. United Parcel Serv., 322 F.Supp.2d 139, 141-42 (D.P.R.2004) (discussing and applying Davis and the like). Consequently, measured by our precedents we conclude that the district judge here made a mistake, and that the mistake is obvious enough. But, again, plain error requires more: the mistake must also be prejudicial

in a sense that there is a reasonable probability (not just a theoretical possibility) that it affected the result, and the result must be unjust, too. See United States v. Marcus, 130 S.Ct. 2159, 2164 (2010); see also United States v. Padilla, 415 F.3d 211, 225 (1st Cir.2005) (Boudin, C.J., concurring) (en banc). This is where Misty Dawn gets tripped up.

For starters, we are not convinced that this was a game-changing error. Cf. United States v. Taylor, 54 F.3d 967, 972 (1st Cir.1995) (stressing that the plain-error doctrine focuses on "blockbuster[ ]" errors) (quotation marks omitted). We question whether Misty Dawn can show that it is reasonably probable-as opposed to merely possible-that the jury would have fixed a different damage figure absent the unit-of-time breakdown. That the jury found Bielunas 15% comparatively negligent as opposed to the 5% his lawyer had argued for suggests that the jury did not blindly adopt counsel's analysis. But we need not dwell on this issue. See Johnson v. United States, 520 U.S. 461, 469 (1997) (skipping over the third component of the plain-error test and deciding the case on the fourth prong).

Assuming for argument's sake that the breakdown affected the outcome of the case, we see no injustice here: given that Bielunas will live out his life in pain, deprived of his livelihood (details we delve more deeply into below), we cannot say that the award is intolerable.

If more were needed-and we doubt that it is-the judge in his charge made clear that the lawyers' statements and arguments were not evidence and that the verdict must be reached on the evidence alone. Misty Dawn's counsel did not object or request any instruction on the unit-of-time issue. After deliberating for a bit, the jury asked the judge if Bielunas's lawyer could go over the "suggested award amounts" and the "reasoning" used to reach them. Misty Dawn's attorney asked the judge to remind the jurors that arguments were not evidence in the case and that they are "to decide" the matter "on their own." The judge agreed and told the jury:

I presume that you are referring to the plaintiff's counsel's argument to you where it was all laid out. I am not going to have him do that again nor should he have to do it again.

What I want you to do is to use your collective memories as to what he said and

what reasoning he offered for the conclusions that he suggested to you. And have in mind what I told you before, that statements of counsel are not the evidence in the case. You are supposed to remember what the evidence was. What counsel was endeavoring to do was to remind you of what the evidence was and put his interpretation before you so you could consider it. So that is the answer to that. You are to try to remember the evidence yourself.

Misty Dawn's lawyer did not object or ask the judge to say anything else, and we think the judge's instructions help undercut any plain-error claim. See United States v. Robinson, 473 F.3d 387, 398 (1st Cir.2007).

Plain error is not an "appellant-friendly" standard, United States v. Vazquez-Molina, 389 F.3d 54, 57 (1st Cir.2004), vacated on other grounds 544 U.S. 946 (2005), and rightfully so: it keeps parties from rolling the dice on a favorable verdict and then raising problems on appeal that could have been easily fixed with a timely objection below. See, e.g., United States v. Jacquillon, 469 F.2d 380, 386 (5th Cir.1972) (Wisdom, J.).

Ultimately, that standard-which is

exceedingly tough to meet-cannot be met here.

The damage amount

As a parting shot, Misty Dawn calls the jury's non-economic damage award (over $2,000,000) unreasonably high and faults the district judge for not ordering a remittitur. We see things differently. Converting legal damages into a monetary award is the jury's job-consequently, only rarely and in extraordinary circumstances will we veto the jury's decision. Casillas-Díaz v. Palau, 463 F.3d 77, 82-83 (1st Cir.2006). That is particularly true when the district judge, who saw and heard the evidence play out, refuses to trim the award. Id. at 83. Stepping lightly, we review that ruling for abuse of discretion, reversing only if the defendant carries the weighty burden of proving that the contested award is "grossly excessive, inordinate, shocking to the conscience of the court, or so high that it would be a denial of justice to permit it to stand." Id. (quotation marks omitted). This means that we will not jettison a damage award simply because we think it too generous, see Whitfield, 431 F.3d at 15-16, but will reverse "only if it is shown to exceed any rational appraisal or estimate of the

damages that could be based upon the evidence before the jury ." Casillas-Díaz, 463 F.3d at 83 (quotation marks omitted). There is no mathematical formula for determining the monetary equivalent of non-economic injuries. See, e.g., Limone v. United States, 579 F.3d 79, 105 (1st Cir.2009). But the district judge told the jurors, without objection, that they could consider any physical, mental, or emotional pain Bielunas has suffered, is suffering, and will suffer because of his wounds. Damages must be reasonable and not based on hunches, the judge stressed, but "no evidence of value" is needed for the intangible injuries: in translating a decision into dollars, "you are not determining value but you should award an amount that you feel will fully and fairly compensate" Bielunas for his past, present, and future mental distress and physical pain. The issue, then, is inescapably "fact-bound," see Casillas-Díaz, 463 F.3d at 83, and the facts, measured under the legal criteria outlined above, support the district judge's decision not to pare down the award. Bielunas suffered unimaginable pain on the SEA WATCHER, and pain clings to him still. A multi-ton hatch cover crushed

his foot, pulverizing a bone, fracturing others in multiple places, and leaving the whole thing a bloodied mess. The doctors could not close the wound for the longest time, and they will never make him fully better-actually, things will only get worse. And the injury has exacted quite a toll, causing him to lose many of the things that made his life worth living. No more working on a fishing boat-in fact, no more meaningful employment at all. No more taking long hikes with friends and family. No more doing certain chores around the house. No more helping neighbors with home-improvement projects. All of this has left him feeling powerless, lost, and depressed. He worries about his future, he lashes out at others, and his marriage has suffered, too. Taking everything into account, we cannot say that the jury's award is unconnected to the evidence, conscience-shocking, or so lavish that it would offend common notions of justice if it stands-so no remittitur is needed. Misty Dawn makes much of the fact that Bielunas does not take pain medication and had fractured the heel on the same foot years before, an injury that Misty Dawn's expert suggested caused many of the same problems that Bielunas

complains about now. None of this changes our view of the case, however. Again, Bielunas explained in exquisite detail how much pain he had after the hatch cover tore a hole in his foot and how much pain he has now-constant, he said, even though he avoids pain pills, and the medical evidence backs up his chronic-pain claim. As to the heel issue, Bielunas never missed a day of work because of that injury, a fact that pours cold water on the expert testimony that Misty Dawn points to-testimony that the jury could, and evidently did, disbelieve in any event. Cf. Primus v. Galgano, 329 F.3d 236, 245 (1st Cir.2003).

Citing to Anthony v. G.M.D. Airline Serv., Inc., 17 F.3d 490 (1st Cir.1994), and Laaperi v. Sears, Roebuck & Co., 787 F.2d 726 (1st Cir.1986), Misty Dawn also argues that because we rejected jury awards there, we should do so here. But these cases offer no aid. For one thing, they are 16 and 24 years old, respectively, which in this context makes them "not particularly helpful" for comparison purposes, see Whitfield, 431 F.3d at 16 (saying so with respect to a 16-year-old precedent). For another thing, they are easily distinguishable from this case.

Anthony found a $566,765 pain-and-suffering award unconscionable because the plaintiff's injury-which was neither painful (relatively speaking) nor permanent-did not "render[ ] him unable to perform any particular functions or engage in any particular activities [or] otherwise interfere[ ] with his professional, recreational, or personal life." Anthony, 17 F.3d at 491, 494-95. Laaperi considered a $750,000 damage award conscience-shocking because the plaintiff suffered "relatively minor injuries, involving no continuing disability" (other than "a non-disabling permanent scar on her lower back, there was no evidence of any medical problems whatsoever within a month and a half" after the incident). Laaperi, 787 F.2d at 734-36. Anthony and Laaperi look nothing like this case, given the huge toll Bielunas's injury has taken on his body and mind.

Misty Dawn also highlights a boatload of non-First Circuit cases where lower courts deemed certain damage awards excessive. Measured against these cases, Misty Dawn says, the objected-to portion of Bielunas's damage award is legally unsustainable. Not so: simply "showing

that the damage award is generous in comparison to other (hand-picked) cases is insufficient to warrant relief." Correa v.. Hospital San Francisco, 69 F.3d 1184, 1198 (1st Cir.1995) (citing Havinga v. Crowley Towing & Transp. Co., 24 F.3d 1480, 1488-89 (1st Cir.1994) (not necessary to compare cases involving dissimilar traumas, dates and locations of trials, and evidence presented)); accord Whitfield, 431 F.3d at 16 (stressing that we will not reject a damage award "merely because the amount of the award is somewhat out of line with other cases of a similar nature") (quotation marks omitted). Ultimately, we see no compelling reason to override the jury's judgment here.[5]

Conclusion

For the reasons arrayed above, we reject Misty Dawn's appeal and affirm the judgment below in all respects. Each side shall bear its own costs.

So Ordered.

FOOTNOTES

1. 46 U.S.C. § 30104.

2. A venerable remedy created to protect seamen from the dangers of living and laboring at sea, maintenance and cure "refers to the provision of, or payment for,

food and lodging ('maintenance') as well as any necessary health-care expenses ('cure') incurred during the period of recovery from an injury or malady." LeBlanc v. B.G .T. Corp., 992 F.2d 394, 396-97 (1st Cir.1993).

3. Because there was no error, we need not consider Misty Dawn's grumble that the admission of Bronson's testimony affected the trial's outcome, see Fed.R.Evid. 103-a complaint that turns in part on Misty Dawn's claim that Bielunas's counsel weaved Bronson's "irrelevant" testimony into his closing argument. Misty Dawn's brief focuses on the evidentiary issue (which falters, given how easily Bronson's testimony clears the low relevancy hurdle) and makes no attempt to construct a reasoned argument that Bielunas's counsel's closing constituted misconduct, so our work on this is done. See, e.g., McCullen v. Coakley, 571 F.3d 167, 182 & n. 3 (1st Cir.2009) (deeming waived arguments hinted at but not developed and addressed to a particular theory), cert. denied, 130 S.Ct. 1881 (2010).

4. Here is a sampling of what Bielunas's counsel said (again, without drawing any objection):Past and future physical pain and suffering: Noting that there are 365

days in a year, counsel suggested $282,000 for "past physical pain and suffering"-$200,000 for the first year (given the immediate "horror" of the calamity), $50,000 for the second year, and $32,000 for the third. Bielunas is "55 years old," counsel added, and is expected to live another 25 years, so "you should award him $800,000 for future physical pain and suffering because he's going to live with that [pain] every day."Past and future mental anguish: "I think the mental anguish of this thing is conservatively $20,000 a year," counsel said. "That's $20,000 a year for the last three years" and "for the rest of his life," counsel added, which comes to $560,000.Past and future disability and inconvenience: Bielunas's "past disability is permanent," counsel argued. "And I submit to you that $33,000 a year" is a good number to cover "the impairment and the inconvenience," which comes to $924,000.

5. The parties also spar over whether Bielunas's counsel told Misty Dawn's lawyer in a phone call that the award's size "shocked" both him and his client. That makes not one whit of difference: what counts is whether the award shocks

our conscience (it does not), not whether it shocks counsel's or his client's.

Marlene Barnett, Appellant,
v.
Bank of America Corporation, Appellee.
No. 3D09-1326
Lower Tribunal No. 03-14301
Third District Court of Appeal
State of Florida
July Term, A.D. 2010
Opinion filed: October 13, 2010.

Not final until disposition of timely filed motion for rehearing.

An Appeal from the Circuit Court for Miami-Dade County, Ronald Dresnick, Judge.

Krupnick, Campbell, Malone, Buser, Slama, Hancock, Liberman & McKee and Kelley B. Stewart and Robert J. McKee, for appellant.

Thornton, Davis & Fein and Daniella Friedman, for appellee.

Before RAMIREZ, C.J., and COPE and GERSTEN, JJ.

COPE, J.

Page 2

This is an appeal of a summary judgment in favor of Bank of America Corporation based upon employer immunity under the Workers' Compensation Law. The question is whether the plaintiff Marlene Barnett is entitled to proceed against the defendant Bank of America on the basis of the intentional acts exception to workers'

compensation immunity.

In 2002, the plaintiff was the manager at Bank of America's Bay Harbor Island branch. The bank was a tenant on the first floor of a building at 1108 Kane Concourse. The landlord decided to renovate the building, and Bank of America agreed to construct a new banking facility on the first floor.

Bank of America wished to keep its branch open during the renovations. It constructed a temporary banking center occupying part of its preexisting space. The bank employees were moved into that space in May or June 2002.

The plans called for a one-hour rated fire wall to be built from floor to ceiling which would separate the temporary banking center from the construction area. According to the testimony of the plaintiff as well as two other employees, the wall was not built in accordance with the plans, did not run up to the ceiling, and did not completely separate the temporary banking center from the construction area.

According to the depositions, the opening between the construction area and the temporary banking center allowed a constant influx of dust, odors, and fumes.

Each day the computers and tables were covered by a thick layer of dust, including concrete dust and fiberglass particles. The employees were breathing dust and fumes from glue, paints and paint thinners. There was no operable air

conditioning system.
According to the depositions, within several weeks the plaintiff and other employees started becoming ill from this exposure with asthma, bronchitis, sinus problems, nose bleeds, headaches, and dermatitis. Eight of the twelve employees made claims for health problems. According to the deposition testimony, the plaintiff and other employees contacted executives from Bank of America to complain. The plaintiff, as manager, requested that the employees be moved to another location or that the bank bring a trailer to the site to house the temporary bank facility. The executives refused these requests because the branch had a safe deposit area which the bank wanted to keep open for its customers. The plaintiff was ordered to keep her employees working at the existing site. Eventually the bank brought in fans and a cleaning crew. After employees began making workers' compensation claims, the bank also brought in air purifiers and coolers. The employees, however, kept getting sick. In December 2002, the bank temporarily closed the facility but then reopened it. Finally in January 2003, the bank shut down the temporary center and moved the employees to another site.

The plaintiff brought suit against the bank and other defendants for injuries she sustained.[1] The bank moved for summary judgment on the basis of workers' compensation immunity. The bank

maintained that the firewall separating the construction area from the temporary bank facility reached all the way to the ceiling, and not partway as the employees testified. The bank argued that it prepared its plans using qualified design professionals and pulled the appropriate building permits. The bank denied that any of the air from the construction area entered the bank's temporary facility. The bank argued that it responded properly to the employee complaints and that as of December 2002, interior air testing revealed that the air quality in the building was within a normal range.

In opposition, the plaintiff relied on employee testimony outlined earlier in this opinion. The plaintiff also filed an affidavit of plaintiff's environmental medical expert, Dr. Albert F. Robbins:

> 3. I have reviewed the Material Safety Data Sheets of products that were used in this deficiently ventilated structure where they worked.
>
> 4. I have been informed that they were exposed to daily, multiple hour exposures of concrete particulates, including silicas, various construction fibers, mold spores and volatile organic chemicals, for which I have reviewed the Material Safety Data Sheets.
>
> 5. The Material Safety Data Sheets on these products and my own knowledge and experience with the other compounds

through my environmental medicine

practice show these compounds to be quite hazardous individually, and substantially more hazardous when inhaled in combination.

6. This environment in the work place was virtually certain to cause injury to the Plaintiffs, Marlene Barnett, Gary Bullard, Oswaldo Membreno, Michelle Morgan, Daisy Herrera, Anateresa Vargas, Lucrecia Vargas and Marek Wojcik.

The trial court granted the bank's motion for summary judgment, and the plaintiff has appealed.

The plaintiff sustained her injuries in the course and scope of her employment. Ordinarily workers' compensation provides the exclusive remedy foran employee for such injuries, and the employer is immune from suit. See Turner v. PCR, Inc., 754 So. 2d 683, 686 (Fla. 2000). There is, however, an intentional tort exception to workers' compensation immunity. Id. The intentional tort exception is applicable where the employer is "shown to have either 'exhibite[d] a deliberate intent to injure *or* engage[d] in conduct which is substantially certain to result in injury or death.'" Id. at 687.[2]

In this case the plaintiff relies on the second alternative. She alleges that the employer engaged in conduct which was substantially

certain to result in injury or death. This is measured by an objective standard. Turner, 754 So. 2d at 688. The

question is "whether a reasonable person would understand that the employer's conduct was 'substantially certain' to result in injury or death to the employee. Under this approach, the employer's actual intent is not controlling." Id. These principles have been reiterated in Bakerman v. The Bombay Co., 961 So. 2d at 262-65.

This is a motion for summary judgment on which we read the factual record in the light most favorable to the plaintiff as the nonmoving party. When the record is read in that light, it is clear that there are disputed issues of material fact regarding the substantial certainty test. To begin with, the bank asserts that there was a firewall which completely separated the temporary bank premises from the construction area so that no dust or fumes could enter the temporary bank quarters. But that is a disputed fact. The testimony of several bank employees states that the partition wall did not reach all the way to the ceiling and was open at the top. The bank itself acknowledges that it provided additional cleaning staff and other devices to correct the additional dust that was entering the premises—a concession which seems to acknowledge that there was no complete separation between the construction area and the

temporary bank quarters. The bank also acknowledges that it installed fans, coolers, and air purifiers in November 2002 which actions are, again, inconsistent with its denial that there was any problem created by the ongoing construction.

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Based on the applicable cases, the summary judgment should not have been granted. In Fisher v. Shenandoah General Construction Co., 498 So. 2d 882, 883 (Fla. 1986), receded from in part, Turner v. PCR, Inc., 754 So. 2d at 691 n.8, the plaintiff alleged that the employer required the decedent to enter pipes which it knew contained noxious fumes and which would "in all probability" cause injury or death. The complaint alleged that the employer had failed to provide its workers with oxygen masks and other appropriate safety equipment. As originally announced in 1986, the Supreme Court held that these allegations did not satisfy the substantial certainty standard, Fisher, 498 So. 2d at 883, but in 2000 in Turner, the Supreme Court modified Fisher and stated that the Fisher facts constituted "a sufficient basis to support an allegation of substantial certainty of injury." Turner, 754 So. 2d at 691 n.8. Thus, requiring an employee to work in an area containing harmful noxious fumes, without providing adequate safety equipment, satisfies the substantial certainty standard.

In Turner, the employer was conducting research

on air conditioning coolants. A supplier of the chemical tetrafluoroethylene (TFE) advised the employer that it was going to discontinue supplying TFE because of its hazardous character. Id. at 685. The employer continued to use the product in its testing, and according to expert testimony, did so using equipment which was fundamentally unsafe. The Court held that these facts created a disputed issue of material fact on

whether the employer's conduct created a substantial certainty of injury, and ruled that the summary judgment in favor of the employer must be reversed. Id. at 691.

In Cunningham v. Anchor Hocking Corp., 558 So. 2d 93 (Fla. 1st DCA 1990), the plaintiffs alleged that they sustained injuries from inhaling toxic fumes at a manufacturing plant where they were not provided adequate safety equipment. They contended that the employer "diverted the smokestack so that fumes would flow into, rather than outside of, the plant, and that they periodically turned off the plant ventilation system, thereby intensifying the level of exposure." Id. at 96. The plaintiff also alleged that the employer "removed manufacturers' warning labels on toxic substance containers, misrepresented the toxic nature of substances, and knowingly provided inadequate safety equipment, while misrepresenting the danger or extent of the toxicity in the plant and the need for

proper safety equipment " Id. at 96-97. The First District held that the substantial certainty standard was met and reversed the order dismissing the complaint.

It bears emphasis that the substantial certainty standard applies where there is substantial certainty of **either** injury **or** death. Turner, 754 So. 2d at 687 (emphasis added). Thus the substantial certainty test has been applied in cases involving a non-fatal injury, Cunningham; Bakerman, 961 So. 2d at 259) (ankle injury), as well as cases involving fatalities. Fisher; Turner.

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The bank relies on McClanahan v. State, 854 So. 2d 793 (Fla. 2d DCA 2003). In that case the plaintiffs were employees of the Florida Department of Juvenile Justice. They worked in a juvenile detention center which had been built in the early 1990s. They alleged that there had been negligence in the design and construction of the building such that it was contaminated by excessive levels of moisture, mildew, and mold. Id. at 794. The plaintiffs alleged respiratory injuries and the wrongful death of a deceased employee. The exact nature of the contamination and extent of risk were not spelled out in the opinion. The Second District concluded that the allegations amounted to claims of negligent conduct and that the substantial certainty test had not been met.

The present case differs significantly. The claim here is that the temporary work space was not

properly separated from the construction area and that the employees were, in effect, being required to work in the middle of a construction project. They alleged continuous exposure to dust and other particles as well as noxious fumes. This persisted from May or June 2002 to January 2003 when the employees were finally allowed to relocate to an alternate space. The factual circumstances here are better documented, including a medical expert affidavit, and are entirely distinguishable from those in McClanahan. The circumstances present here bear a greater resemblance to Fisher, Turner, and Cunningham than to McClanahan.

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The bank relies on Pendergrass v. R.D. Michaels, Inc., 936 So. 2d 684 (Fla. 4th DCA 2006). The Pendergrass case involved the collapse of a wall at a construction site where the affidavit of the plaintiff's expert only stated that the employer had been negligent and did not address the substantial certainty standard. Id. at 693.[2]

The bank relies on Bourassa v. Busch Entertainment Corp., 929 So. 2d 552 (Fla. 2d DCA 2006), but that case is not helpful to the bank. The plaintiff was an animal trainer at Busch Gardens. She conducted a simulated blood draw from a full grown lion. There was a procedure which, "[w]hen performed correctly, the procedure did not allow for any part of Max's [the lion's] mouth to come into contact with any

part of the keeper's body." Id. at 555. However, on the day of the incident, the lion was able to grab the plaintiff's fingers, resulting in a struggle in which the plaintiff's arm was severed at the elbow. The Second District upheld the workers' compensation immunity, based on the fact that Busch Gardens had a

training program in place which was believed to be adequate to address the risk of working with the lion.[4]

The bank relies on Wilks v. Boston Whaler, Inc., 691 So. 2d 629 (Fla. 5th DCA 1997), which involved a respiratory injury. The Wilks case was decided in 1997 and was based squarely on the Supreme Court's decision in Fisher. The Florida Supreme Court receded from Fisher in 2000. Turner. The legal basis of Wilks has been undermined.

The bank also maintains that the expert affidavit of Dr. Robbins was legally insufficient. The objection in the trial court was that the affidavit was lacking in personal knowledge and did not attach the documents to which the doctor referred. The legal authority cited by the bank was CSX Transportation, Inc. v. Pasco County, 660 So. 2d 757, 759 (Fla. 2d DCA 1995). That case involved affidavits submitted by fact witnesses trying to establish whether construction had begun on a railroad crossing as of a particular date. The affidavit in this case is the affidavit of an expert witness. The bank has

not provided any authority for the proposition that the affidavit is insufficient as the affidavit of an expert witness.

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For the stated reasons, there are disputed issues of material fact and summary judgment should not have been granted. We reverse the summary judgment and remand for further proceedings.